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RELEVANT DOCKET ENTRIES

(No docket entries appear in the record. Therefore a substitute of the chronological list of the important dates on which pleadings were filed, hearings held and orders entered are hereinafter set forth.)

1. Indictment returned and filed September 27, 1966.
2. General demurrer filed January 17, 1967.
3. Order overruling general demurrer entered and filed January 17, 1967.
4. Special demurrer filed January 17, 1967.
5. Order overruling special demurrer entered and filed January 17, 1967.
6. Motion to suppress evidence filed January 17, 1967.
7. Hearing on motion to suppress held January 17, 1967.
8. Order overruling motion to suppress entered January 17, 1967 and filed January 20, 1967.
9. Verdict of guilty returned January 19, 1967.
10. Sentence imposed January 19, 1967.
11. Motion for new trial filed January 19, 1967.
12. Motion for new trial overruled November 20, 1967.
13. Notice of appeal filed December 14, 1967.
14. Enumeration of errors filed in Georgia Supreme Court January 15, 1968.
15. Opinion and judgment of Georgia Supreme Court filed April 9, 1968.
16. Motion for rehearing filed in Georgia Supreme Court April 19, 1968.
17. Motion for rehearing denied by Georgia Supreme Court April 22, 1968.
18. Notice of appeal to Supreme Court of United States filed May 1, 1968.

Supreme Court of the United States

OCTOBER TERM, 1968

No. 293

ROBERT ELI STANLEY,

v

Appellant,

THE STATE OF GEORGIA,

Appellee.

DESIGNATION OF RECORD BY APPELLANT

Now comes appellant, within ten (10) days after the order of this Court noting probable jurisdiction, and designates the parts of the Record which he intends to include in the Appendix and a statement of the issues which he intends to present for review as follows:

DESIGNATION OF RECORD FOR INCLUSION IN APPENDIX

1. The Indictment;
2. General Demurrer;
3. Order overruling General Demurrer;
4. Special Demurrer;
5. Order overruling Special Demurrer;
6. Motion to Suppress Evidence;

7. Stipulations of counsel on hearing of Motion to Suppress Evidence, (R. 86 to 88);
8. Testimony of George A. Carter on hearing of Motion to Suppress Evidence, (R. 89 to 96);
9. Search Warrant and Supporting Affidavits;
10. Order overruling Motion to Suppress;
11. Verdict and Sentence;
12. Notice of Appeal to Georgia Supreme Court;
13. Enumerations of Error;
14. Opinion of Georgia Supreme Court;
15. Judgment of Georgia Supreme Court;
16. Motion for Rehearing in Georgia Supreme Court;
17. Order Denying Motion for Rehearing;
18. Notice of Appeal to Supreme Court of the United States.

ISSUES WHICH APPELLANT INTENDS TO PRESENT FOR REVIEW

1.

Whether Georgia Code Section 26-6301 (Ga. Laws, 1963, p. 78), under which the appellant was convicted, is repugnant to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing freedom of press and due process in that the statute removes the element of scienter from the definition of the offense of possessing obscene matter, and makes the mere possession of such matter a crime.

2.

Whether a search warrant issued by a U.S. Commissioner authorizing a search of premises for bookmaking records and other wagering paraphernalia, founded on affidavits that the person's home sought to be searched has not registered as a gambler under the Wagering Tax Act, is invalid since the holding by this Court in *Marchetti v. U.S.*, 88 S.Ct. 697, No. 2, Oct. Term, 1967, decided January 29, 1968 and *Grosso v. U.S.*, 88 S.Ct. 709, No. 12, Oct. Term, 1967, decided January 29, 1968.

3.

Whether the Supreme Court of Georgia erred in holding and deciding that the search warrant and the search conducted thereunder were legal.

4.

Whether a state officer, acting in concert with federal agents executing a federal search warrant issued for failure to register as a gambler, were constitutionally authorized to seize motion picture films concealed in a desk drawer of appellant's home on a claim by the state officer that the films were obscene where such search warrant did not describe the films to be seized and there was no prior adjudication that they were obscene.

5.

Whether a state may constitutionally punish an individual for the mere possession of films alleged to be obscene where there is no evidence to show the appellant had prior knowledge that they were obscene, or that he had ever viewed them, or that he had permitted juveniles

to view them, or that he was publishing them in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or that he was "pandering" them.

(Signature of Counsel and
Certificate of Service Omitted in Printing)

* * * *

INDICTMENT

STATE OF GEORGIA, COUNTY OF FULTON..

IN THE SUPERIOR COURT OF SAID COUNTY.

THE GRAND JURORS selected, chosen and sworn for the County of Fulton, to-wit: (Names of Grand Jurors omitted in printing.) in the name and behalf of the citizens of Georgia, charge and accuse ROBERT ELI STANLEY with the offense of:

FELONY (POSSESSION OF OBSCENE MATTER) for that said accused, in the County of Fulton and State of Georgia, on the 7th day of September, 1966 did knowingly have possession of "obscene matter, to wit: one reel of motion picture film entitled "Young Blood", showing a nude man exhibiting his male organ and a nude woman exhibiting her female organ, the nude man and nude woman being engaged in acts of perversion and sodomy, the nude man having his mouth and tongue upon, against and into the female organ of said nude woman, the nude woman taking and having the male organ of the nude man in her mouth, said motion picture film also showing a nude man and a nude woman engaged in an act of sexual intercourse; one reel of motion picture film showing a nude man and a nude woman exhibiting their private parts, said film also showing a nude man and a nude woman engaged in an act of sexual intercourse, said nude man and nude woman engaged in an act of Sodomy the woman having and taking the male organ of said man into her mouth, said reel of motion picture film being a different film from others alleged in this indictment; one reel of motion picture film showing a nude woman and a nude man exhibiting their private parts engaged in an act of sexual intercourse, and in an

act of perversion the woman taking and having the male organ of said man in her mouth, said reel of motion picture film being a different film from others alleged in this indictment; said accused having knowledge of the obscene nature of such motion picture film and matter; said motion picture films when considered as a whole and applying contemporary community standards that exist in this county, being obscene matter whose predominant appeal is to a shameful and morbid interest in nudity and sex; and accused should reasonably have known of the obscene nature of said matter; said act of accused being contrary to the laws of said State, the good order, peace and dignity thereof.

(Signatures of Solicitor General and Foreman of Grand Jury Returning Special Presentment, Plea of Not Guilty and Certificate of Filing Omitted in Printing.)

* * * *

FULTON SUPERIOR COURT

GENERAL DEMURRER

(Title Omitted in Printing)

Now comes defendant, Robert Eli Stanley, prior to arraignment, and files this, his general demurrer to said indictment, on the following grounds:

1.

The indictment fails to set forth facts constituting any valid offense against the laws of Georgia.

2.

The Act of the General Assembly of Georgia of 1963, pp. 78, 79, from which the indictment in this case was drawn, is unconstitutional, null and void on its face in that it was passed and enacted by the General Assembly of Georgia as an amendment to Code Chapter 26-63, relating to obscene and abusive and vulgar language, as amended particularly by an Act approved March 17, 1956 (Ga. Laws 1956, p. 801), whereas said Act purported to be amended was declared null and void by the Supreme Court of Georgia prior to the passage of said amending Act.

3.

The Act from which the indictment in this case was drawn, to-wit: Georgia Laws of 1963, p. 78, is unconstitutional, null and void as in conflict with the First and Fourteenth Amendments to the Constitution of the United States guaranteeing freedom of the press and due process of law in that it seeks to punish persons charged with a violation of said Act if they reasonably should

know of the obscene nature of such matter, whereas such reasonable knowledge would withdraw the element of scienter from the definition of said offense and render one person guilty without actual knowledge of the obscene nature of such matter.

WHEREFORE, Defendant prays that this demurrer be sustained, and that the indictment be dismissed.

(Signature of Counsel Omitted in Printing)

* * * *

FULTON SUPERIOR COURT
(Title Omitted in Printing)

ORDER

The above and foregoing General Demurrer to Indictment No. 90448, Fulton Superior Court, being the case of *State v. Robert Eli Stanley*, having been filed on this date, and the Court having heard argument and citation of authorities by counsel for the State of Georgia and for the above named defendant.

It is hereby ordered and adjudged that the General Demurrer be and it is hereby overruled and denied as to each and every ground thereof.

This 17th day of Jan. 1967.

(Certificate of Filing and Signature of Judge Omitted in Printing)

* * * *

FULTON SUPERIOR COURT

(Title Omitted in Printing)

SPECIAL DEMURRER

Now comes Defendant, Robert Eli Stanley, prior to arraignment, and specially demurs to said indictment on the following grounds:

1.

Defendant specially demurs to that portion of the indictment alleging that "accused should reasonably have known of the obscene nature of said matter" in that said allegation seeks to remove the element of scienter or actual knowledge from the stated offense by placing criminal responsibility on defendant without actual knowledge of the obscene nature of said alleged material, in violation of the First and Fourteenth Amendments to the Constitution of the United States guaranteeing freedom of the press and due process of law.

2.

The allegation of said indictment that "accused having knowledge of the obscene nature of such motion picture film and matter" is repugnant to, and in direct conflict with the allegation that "accused should reasonably have known of the obscene nature of said matter" and is too vague, indefinite and uncertain to put defendant on notice of what conduct or state of mind he is being called on to defend.

WHEREFORE, Defendant prays this special demurrer be sustained.

(Certificate of Filing and Signature of Counsel Omitted in Printing)

* * * *

FULTON SUPERIOR COURT

(Title Omitted in Printing)

ORDER OVERRULING AND DENYING SPECIAL DEMURRER

After hearing arguments of counsel and citations of authority by counsel for the State of Georgia and for the defendant, Robert Eli Stanley, on the Special Demurrer filed in the above stated case on January 17, 1967;

IT IS HEREBY ORDERED AND ADJUDGED that said Special Demurrer be and the same is hereby overruled and denied on each and every ground.

This the 17th day of January, 1967.

(Certificate of Filing and Signature of Judge Omitted in Printing)

* * * *

FULTON SUPERIOR COURT

(Title Omitted in Printing)

MOTION TO SUPPRESS EVIDENCE

Now comes defendant, Robert Eli Stanley, prior to arraignment, and moves the Court to suppress for use as evidence and order returned the following articles: three reels of motion picture film entitled "Young Blood" as is described in the indictment in this case, on the following grounds:

1.

Said articles were seized from defendant's home without his consent on the 7th day of September, 1966, in Fulton County, Georgia by one George A. Carter, an Investigator of the Solicitor General of the Criminal Court of Fulton County, without a lawful search warrant particularly describing said articles to be seized.

2.

The articles seized were motion picture film for which no prior adjudication had been made that said articles were obscene, and thus defendant's rights as guaranteed by the First Amendment to the United States Constitution providing for freedom of press were violated by said seizure.

3.

The seizure of said motion picture film by said officer was a violation of defendant's constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution, in that said search and seizure was illegal and unreasonable, and defendant was thus denied

due process of law by said officer acting as an Agent of the State of Georgia.

WHEREFORE, Defendant prays that the Court inquire into this motion, and that the motion picture films so seized and in the possession of the Solicitor General in this case be suppressed for use as evidence.

(Signature of Counsel and Certificate of Filing Omitted in Printing)

* * * *

STIPULATION OF COUNSEL ON MOTION TO SUPPRESS

(R. 86)

BY THE COURT: You may go ahead with your motion to suppress, we'll take a five minute break here.

(Here followed a short recess.)

BY THE COURT: You may proceed.

BY MR. SPARKS: Mr. Asinof and I have discussed the matter of the motion to suppress evidence, and as your Honor knows, under the law of the State of Georgia at this time the search and seizure act of 1966, the burden is on the State to show that the seizure was lawful. We have agreed, (R. 87) Mr. Asinof and I have agreed that we can stipulate the facts, and the State takes the position that entry was made into the home of Robert Eli Stanley at 280 Springside Drive, S.E., Atlanta, in Fulton County, Georgia, under and by virtue of authority of a search warrant issued by Frank A. Holden, United States Commissioner for the Northern District of Georgia, based on an affidavit by T. O. Peacock, J. R. Arnold, George A. Carter, and W. A. Pair, which I tender and ask that it be marked State's Exhibit No. 1. It is an exemplified copy by the Clerk of the Court of the United States District Court and the Honorable Lewis R. Morgan, United States District Judge.

BY THE COURT: Let it be entered.

BY MR. ASINOF: I would like to further add to that, at the time of the search, pursuant to that particular warrant, which has been stipulated into evidence on this motion, that during the search that one or more of the officers making the search was Mr. George A. Carter, an investigator with the Solicitor of the Court of Fulton

County, that three cans of film consisting of three reels of film that is the subject matter of this indictment of this case was found by Mr. Carter (R. 88) in a drawer closed up in the upstairs portion of said house.

BY MR. SPARKS: To be entirely accurate, I believe they were found by Mr. Darrell Smith, an Internal Revenue Service agent of the United States Government, Treasury Department, he actually opened the drawer and found it. He was one of the federal agents who was executing the warrant.

BY MR. ASINOF: Was Mr. Carter present at that time?

BY MR. CARTER: Yes, sir.

BY THE COURT: Were you present, Mr. Carter?

BY MR. CARTER: Yes, sir.

BY MR. ASINOF: It is stipulated that Mr. Carter was present and that the drawer was actually opened up by the federal agent.

It may be perhaps I could proceed a lot better if I could informally put Mr. Carter on the stand and develop what happened.

BY THE COURT: All right.

* * * *

TESTIMONY OF GEORGE A. CARTER

(R. 89)

EXAMINATION

BY MR. ASINOF:

Q State your full name.

A George A. Carter.

Q Mr. Carter, were you present on the 7th day of September, 1966 at the time that the defendant's home was being searched?

A Yes, sir.

Q And were you present along with federal agents at that time?

A Yes, sir.

Q Specifically with respect to these three cans of film or three reels of film that is the subject matter of this indictment in this case, do you know where those reels of film were found?

A Yes, sir, they were found in a desk in the upper bedroom of the home.

Q Was the drawer in which they were found closed?

A Well, now, when I first saw the film, Mr. Asinof, was when Agent Smith called my attention to them and he had the drawer open at that time and was going through it.

(R. 90)

Q Were these three rolls of film 8 millimeter or 16 or 35 millimeter film?

A I'm not acquainted with films, the size of them, but I believe they were all 8 millimeter.

Q 8 millimeter?

A Yes, sir.

Q Could you ascertain the contents of the film with your naked eye or did you have to use, or did you use a projector to project the film?

A We used a projector.

Q Where did you find that projector?

A In the middle room in the upstairs room that was used or furnished as a living room and there was a projector in there at the time.

Q Was it a regular movie projector that took this type film, or did you have to plug it in?

A It was a regular movie projector that had to be plugged in in a wall socket.

Q Did you observe all of the three films in this manner?

A Yes, sir.

Q Could you tell approximately how long it took to see all three of them, how long did they run?

(R. 91)

A Well, estimating, I would say about 50 minutes.

Q About 50 minutes?

A I could be wrong one way or the other, that is strictly an estimate.

Q I will ask you whether or not the defendant, Mr. Stanley, violated any other law in your presence?

A No, sir.

Q Now did you have a search warrant at that time in your possession or to your knowledge did any of the other officers or agents have a search warrant in their possession specifically calling for the seizure of these three reels of film?

A No, sir, we did not.

Q To your knowledge, had there been any prior

adjudication by the Literature Commission or any court to your knowledge adjudicating that these motion picture films that you seized were obscene?

A No, sir, I do not.

Q After finding the films and viewing them, did you make any attempt to secure a warrant authorizing you to seize these films as being obscene?

A No, sir, I did not. I called the Solicitor at the Superior Court of Fulton County and talked with him.

(R. 92)

Q Did you have any arrest warrant for Mr. Stanley at that time?

A No, sir, no, sir.

Q Did you seize the film at that time?

A Yes, sir, I did.

Q What did you next do with them after you seized them?

A We ran them, I took possession of the film and did maintain possession of them.

Q Were those films exhibited to your knowledge to the Grand Jury at the time of this indictment?

A —No, sir, we did not exhibit them to the Grand Jury, I don't believe that we did. We did exhibit them to a group of people later.

Q What group of people are you speaking of, Mr. Carter, was it the Literature Commission or members of the Grand Jury or—

A There were some members as I understand of the

Literature Commission, I understand that Dr. Westmoreland was one of the people that viewed it.

Q To your knowledge, though, it had not been viewed by any of these members of the Literature Commission prior to the time you seized them?

(R. 93)

A No, sir, no, sir.

BY MR. ASINOF: I believe that is all the evidence on this motion.

EXAMINATION

BY MR. SPARKS:

Q Mr. Carter, what was your assignment at this time when you accompanied federal officers on this raid?

A My assignment was wagering, lottery, commonly known as the numbers game, bookmaking.

Q You have been working that type case for a long time, isn't that correct, as an investigator for the Solicitor's Office with the Criminal Court of Fulton County?

A Yes, sir.

Q Now I show you State's Exhibit No. 1 and ask you to refresh your recollection and ask you what you and the other federal officers were looking for under the authority of the federal search warrant?

A We were looking for bookmaking paraphernalia, records pertaining to that.

Q All right, at the time that you made this search, who was in the house?

A Upstairs with me was Mr. Farr and Mr. Darrell

Smith, and in the other part of the house was Mr. Pair, W. A. Pair, (R. 94) and a number of other agents.

Q All right, I mean, with reference to the occupants of the house other than the officers when you arrived, who was home there?

A When we went in, Mr. Stanley was there alone, and on the inside of the house and shortly thereafter, two other men came.

Q Who were they?

A One of these was Mr. Joe Dean Stanley and a Mr. Wallace I believe it was.

Q All right, now did you make any observations in the bedroom of Mr. Stanley, sir, the place where these three reels of motion picture film were found, did you look in the closets or anything like that?

A Yes, sir, we searched the room as thoroughly as we could.

Q Were you or not able to identify any of the clothes or any of the other objects in there as belonging to Mr. Robert Eli Stanley?

A Yes, sir, drycleaning, clothes that had drycleaning bags, they had his name on them. There was some mail in there that was addressed to Mr. Stanley and I think there was a tax (R. 95) notice for 280 Springside Drive in there.

Q Did you see Mr. Stanley put on any articles of clothing that were in the bedroom?

A When we got ready to leave, he asked permission to get his coat to put on and went upstairs and got his coat out of that room.

Q Out of that bedroom where the film were found?

A Yes, sir.

Q Have you known Mr. Stanley for some length of time?

A Yes, sir, I've known Mr. Stanley for quite a few years.

Q Do you know what his marital status is, I mean is he single or married?

A I believe he told me that night he was single.

Q I see. With reference to these rolls of film which you found, I will ask you—These three cans of film—Did Mr. Stanley ever acknowledge possession or ownership of those films?

A No, sir. I went downstairs and advised him that I had found some film, obscene film upstairs and that he was under arrest. He made no statements whatsoever.

(R. 96)

Q Am I correct, sir, that you arrested him only after you had used the movie projector there in his house and had shown and viewed the film and talked with the Solicitor General, Mr. Lewis Slaton?

A That is correct, Mr. Slaton advised me to view the film and if in my opinion they were obscene to make a case and he would set the bond.

Q You at that time were a State officer, is that correct?

A That is correct.

Q That took place in Fulton County, Georgia?

A Yes, sir.

Q And you all did go in under the authority of State's Exhibit No. 1, the search warrant, which I showed you?

A Yes, sir.

BY MR. SPARKS: That's all.

BY MR. ASINOF: That's all I have.

BY MR. SPARKS: I tender in evidence State's Exhibit 1 in evidence.

BY MR. ASINOF: It has been stipulated, to be considered by the court.

* * * *

SEARCH WARRANT

UNITED STATES DISTRICT COURT FOR THE

Northern District of Georgia, Atlanta, Georgia

UNITED STATES OF AMERICA vs. ROBERT ELI STANLEY 280 Springside Drive, S.E. Atlanta, Fulton County, Georgia	Commissioner's Docket No. 10 Case No. H-346 SEARCH WARRANT

To Special Agent W. A. Pair or any other Special Agent of the Internal Revenue Service

Affidavit having been made before me by T. O. Peacock, J. R. Arnold, George A. Carter and W. A. Pair that they have reason to believe that on the premises known as 280 Springside Drive, S.E., two story residence with an annex on the main floor constructed of brick and frame, in Atlanta, Fulton County, Georgia, in the Northern District of Georgia there is now being concealed certain property, namely bookmaking records, wagering paraphernalia consisting of bet slips, account sheets, recap sheets, collection sheets, adding machines, money used in or derived from the wagering business, records of purchases, records of real estate and bank transactions, the money for which was derived from the wagering business, and any other property used in the wagering business, which are being used and/or have been used in the operation of a bookmaking business or represent the fruits of a bookmaking business being operated in violation of Sections 4411, 4412 and 7203 IRC of 1954.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 7th day of September, 1966.

(Signature of U.S. Commissioner
Omitted in Printing)

RETURN

I received the attached search warrant September 7, 1966, and have executed it as follows:

On September 7, 1966 at 6:00 o'clock P.M., I searched the premises described in the warrant and

I left a copy of the warrant with Robert Eli Stanley together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1. Sports Journal and line sheet for games August 1 to September 3, 1966.
2. One Sports Journal and line sheet for games for week ending September 18, 1966.
3. Twenty-one Sports Journal and lines sheets for week ending September 18, 1966.

(Jurat Omitted in Printing)

AFFIDAVIT FOR SEARCH WARRANT

UNITED STATES DISTRICT COURT

FOR THE

Northern District of Georgia, Atlanta, Georgia

(Caption Omitted in Printing)

BEFORE Frank A. Holden, Atlanta, Georgia

The undersigned being duly sworn deposes and says:

That they have reason to believe that on the premises known as 280 Springside Drive, S.E., a two story residence with an annex on the main floor constructed of brick and frame in Atlanta, Fulton County, Georgia, in the Northern District of Georgia, there is now being concealed certain property, namely bookmaking records, wagering paraphernalia consisting of bet slips, account sheets, recap sheets collection sheets, adding machines, money used in or derived from the wagering business, records of purchases, records of real estate and bank transactions the money for which was derived from the wagering business and any other property used in the wagering business, which are being used and/or have been used in the operation of a bookmaking business or represent the fruits of a bookmaking business being operated in violation of Sections 4411, 4412 and 7203 IRC of 1954.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

See Attached Affidavits

(Jurat Omitted in Printing)

AFFIDAVIT OF W. A. PAIR

UNITED STATES OF AMERICA }
NORTHERN DISTRICT OF GEORGIA } SS

Personally appeared before Frank A. Holden, United States Commissioner, Northern District of Georgia, Atlanta, Georgia, Special Agent W. A. Pair, Intelligence Division, Internal Revenue Service, who, after being first duly sworn upon his oath, deposes and says:

On March 1, 1966, I received confidential information considered reliable that Robert Eli Stanley and Jerry D. Paschall were engaged in a bookmaking operation and were using Atlanta area telephone numbers 483-7002 and 483-7014 to carry on this business.

Both Stanley and Paschall are well known bookmakers in the Atlanta area. Stanley has had the reputation of being a prominent lottery figure in Atlanta for many years and in the past few years has branched out into the bookmaking business. He was arrested in the Atlanta area on April 19, 1955 and on June 5, 1957 and charged with lottery. He was arrested again in 1957 on charges of receiving stolen goods and received a sentence of 1-5 years which he served in Reidsville, Georgia.

Jerry D. Paschall is also well known in the Atlanta, Georgia area as a bookmaker. On September 15, 1965, he purchased a Special Occupational Tax Stamp-Wagering for the fiscal year ending June 30, 1966, using a residence address of Augusta, Georgia and a business address of "At Large". On September 26, 1965, Fulton County Authorities arrested Paschall in an apartment in Atlanta, Georgia, and charged him with bookmaking.

On or about March 4, 1966 I checked with Southern Bell Telephone and Telegraph Company, Atlanta, Georgia, and determined that both 483-7014 and 483-7002

are private lines listed to Jerry Loomis and are installed in Apartment No. 8, Goza Apartments, Conyers, Georgia. Loomis listed himself with Southern Bell as a manufacturer's agent for Southern Plywood.

During the period April 21, 1966 through May 13, 1966, Special Agents of the FBI, under the direction of Special Agent John Ogden, periodically maintained a surveillance of Jerry D. Paschall and determined that each day between the hours of 9:00 and 10:00 a.m. he proceeded in his white 1963 Ford Fairlane, 1966 Georgia Tag 2-D-25821, to a house located in a negro area on Lester Road, Conyers, Georgia, where he parked the Ford Fairlane, entered a 1951 Ford, blue with white top, 1966 Georgia Tag 89-932, and proceeded to Apartment No. 8, Goza Apartments, Conyers, Georgia. Each afternoon between the hours of 1:30 and 2:00 p.m. Paschall left the Goza Apartments in the 1951 Ford, proceeded to the negro house on Lester Road where he left the 1951 Ford, entered his 1963 Ford Fairlane and proceeded to his residence at 3190 Clifton Church Road, S.E., Atlanta, Georgia.

On May 19, 20, 24, 25, 26 and 27, 1966, Special Agent T. O. Peacock and I maintained a surveillance of the negro house on Lester Road, Conyers, Georgia, and the Goza Apartments, Conyers, Georgia, and observed that each day between the hours of 9:00 and 10:00 a.m., Jerry Paschall arrived at the house on Lester Road in his 1963 white Ford Fairlane, 1966 Georgia Tag 2-D-25821, parked this vehicle, entered a 1951 Ford, blue with white top, 1966 Georgia Tag 89-932, and proceeded to Goza Apartments, Conyers, Georgia, where he parked the 1951 Ford in the tenants' parking lot and entered Apartment No. 8. Each afternoon between 1:30 p.m.

and 2:00 p.m., Paschall left Apartment No. 8, entered the 1951 Ford and proceeded to the negro house on Lester Road where he parked the 1951 Ford, entered the 1963 Ford Fairlane and departed.

On May 24, 1966 at 1:25 p.m. I observed Charley A. Thomas arrive at the Goza Apartments in a 1959 white Chevrolet Impala 4 door, 1966 Georgia Tag 89-J-1515, park in the tenants' parking lot and enter Apartment No. 8 by the back door. Again on May 25, 1966 at 1:37 p.m. Thomas arrived in the 1959 Chevrolet and entered Apartment No. 8 by the rear door. On May 26, 1966 at 1:10 p.m. Thomas again arrived at the Goza Apartments and entered Apartment No. 8 by the rear door where he remained until 8:05 p.m. On May 27, 1966 at 1:40 p.m. Thomas again arrived at the Goza Apartments and entered Apartment No. 8 by the rear door.

Charles A. Thomas is well known as a bookmaker in the Atlanta area. I arrested him in 1960 in an apartment in the Howell House, Atlanta, Georgia, where he was operating a bookmaking business. He was charged with engaging in the business of accepting wagers without having first purchased a Special Occupational Tax Stamp-Wagering to which he subsequently entered a plea of guilty. Thomas subsequently purchased a wagering tax stamp for the year ending June 30, 1964, using an address of Route 3, Box 312, Conyers, Georgia. He also purchased such a stamp for the year ending June 30, 1965, using P. O. Box 581, 3 miles east of Stockbridge, Georgia, as his address: In May 1966 Thomas purchased such a stamp for the year ending June 30, 1966, using an address of 261 Broad Street, Augusta, Georgia.

On May 26, 1966, I checked the records of Georgia

Motor Vehicle Bureau and determined that Georgia Tag 89-932 was issued to J. L. Loomis, Route 2, Conyers, Georgia, for a 1951 Ford, two door. 1966 Georgia Tag 2-D-25821 was issued to Helen Paschall, 1974 Bragg Street, Chamblee, Georgia, for a 1963 Ford two door hardtop. 1966 Georgia Tag 89-J-1515 was issued to Jeanette E. Thomas, Route 2, Conyers, Georgia, for a 1959 Chevrolet, Serial No. F59A192147.

On May 26, 1966, I also determined that Charles A. Thomas was residing at Apartment No. 4, 1795 Pryor Road, S.E., Atlanta, Georgia. Agent Peacock and I checked this address at 10:37 a.m. and observed the white 1959 Chevrolet parked there.

On May 31, 1966, we again placed the house on Lester Road and the Goza Apartments, Conyers, Georgia, under periodic surveillance and at 10:33 a.m. observed the 1963 Ford Fairlane at the Goza Apartments. At 1:00 p.m. the Ford Fairlane was gone and thereafter no further activity was noted at the Apartments. On that same day at 3:22 p.m. we observed Thomas' 1959 Chevrolet parked at 1795 Pryor Road, S.E., Atlanta, Georgia, but now bearing 1966 Georgia Tag 1-J-48402.

On that same day I checked with Georgia Motor Vehicle Bureau and determined that 1966 Georgia Tag 1-J-48402 was issued to Jeanette E. Thomas, 1995 Pryor Road, Atlanta, Georgia, for a 1959 Chevrolet, Serial No. F59A192147, the same serial number as for 1966 Georgia Tag 89-J-1515.

On June 2, 1966, I received confidential information that Stanley and Paschall had closed down their bookmaking operation.

On or about July 25, 1966, I received confidential information considered reliable that Bob Stanley had been accepting wagers over Atlanta, Georgia telephone number 361-4807 at his home and that he now had employed Charles A. Thomas to accept wagers for him over that same telephone located at Stanley's residence.

On that same day I checked the records of District Director of Internal Revenue, Atlanta, Georgia, and found that neither Robert E. Stanley nor Charles A. Thomas had purchased a Special Occupational Tax Stamp-Wagering or registered with the District Director for the fiscal year ending June 30, 1967.

On August 1, 2, 3, 4, 5, 8, 12, 13, 15, 16, 19, 20, 22, 1966, Special Agent T. O. Peacock conducted periodic mobile surveillance of Robert Eli Stanley's residence at 280 Springside Drive, S.E., Atlanta, Georgia, and observed that Charles A. Thomas' 1959 white Chevrolet Impala, 4 door, 1966 Georgia Tag 1-J-48402, arrived at that location at approximately 9:30 a.m. and remained there throughout the day.

On August 23, 1966, Investigator Carter, Agents Peacock, Arnold and I, maintained surveillance of the area around Robert Eli Stanley's residence located at 280 Springside Drive, S.E., Atlanta, Georgia, and observed Charles A. Thomas arrive there at 9:35 a.m. driving his 1959 white Chevrolet Impala 4 door. At 8:10 p.m. we observed Thomas leave in the 1959 Chevrolet and followed him to his residence in Swan Lake Estates, RFD, Stockbridge, Georgia.

On August 24, 1966 at 8:00 a.m. we placed Thomas' residence at Swan Lake Estates under surveillance and observed him leave in the 1959 Chevrolet and proceed

to Stanley's residence where Arnold saw him enter the premises at 9:40 a.m. We maintained periodic mobile surveillance of Stanley's residence until 7:00 p.m. at which time Thomas was still there.

On August 25, 1966, Investigator Carter and Agent Arnold maintained surveillance of Stanley's residence and at 9:38 a.m. observed Thomas arrive in his 1959 Chevrolet, park in the rear of the house and enter the back door. Several persons arrived and left during the day and at 1:23 p.m. Bob Stanley left in a blue Oldsmobile. Prior to that time he had been in and around the premises and had left the premises for short periods of time and returned. At 1:35 p.m. Thomas left in his Chevrolet and returned at 3:45 p.m. They discontinued this surveillance at approximately 5:00 p.m. and Agents Arnold and Peacock began a periodic mobile surveillance of Stanley's residence and observed Thomas leave the premises at 8:25 p.m. and proceed to his residence at Swan Lake Estates.

On August 26, 1966, at 8:15 a.m., Investigator Carter and Agent Arnold set up surveillance on Stanley's residence and at 9:26 a.m. observed Thomas arrive there in his 1959 Chevrolet. They discontinued their surveillance at 3:30 p.m. at which time both Bob Stanley and Thomas were still on the premises. Stanley had been in and around the premises throughout the day. At approximately 5:00 p.m. Carter and I began a periodic mobile surveillance of Stanley's residence and observed Thomas' Chevrolet parked there. At 8:55 p.m. we saw Thomas leave the premises and proceed toward his home.

On August 27, 1966 Agent Peacock observed Thomas' 1959 Chevrolet parked at Stanley's residence.

On August 29, 1966 Investigator Carter and Peacock placed Stanley's residence under surveillance and at 9:29 a.m. saw Thomas arrive in his 1959 Chevrolet and enter the rear of the house. At 10:37 a.m. Stanley left the premises in a blue Oldsmobile. They discontinued the surveillance at 4:37 p.m. at which time Thomas was still on the premises. At 8:23 p.m. Agent Arnold observed Thomas at the intersection of Springside Drive, S.E., and Jonesboro Road where he proceeded south toward his home.

On August 29, 1966 I checked with Southern Bell Telephone and Telegraph Company, Atlanta, Georgia, and determined that two non-published telephones, 361-4807 and 361-5176 were installed in the residence at 280 Springside Drive, S.E., Atlanta, Georgia in the name of Robert E. Stanley.

On August 30, 1966 Peacock and Carter again placed Stanley's residence under surveillance and at 9:53 a.m. observed Joe Dean Stanley arrive and enter the house, however, Thomas did not arrive. They discontinued surveillance at 12:53 p.m. At 10:30 a.m. Agent Arnold and I located Thomas' Chevrolet at Goza Apartments, Conyers, Georgia. Beginning at 1:48 p.m. Carter, Peacock and Arnold maintained a periodic mobile surveillance of Goza Apartments and found that Thomas' vehicle remained there. At 8:16 p.m. they saw Thomas leave Apartment No. 8 and proceed in his 1959 Chevrolet to a shopping center located on Wesley Chapel Road adjacent to I-20 where at 8:30 p.m. he met Jerry D. Paschall who was driving a 1963 white Ford Fairlane, 1966 Georgia Tag 2-D-25821. After about 5 minutes both vehicles left with Paschall going west on I-20.

On August 31, 1966 Carter, Arnold and I placed

Thomas under surveillance and at 9:15 a.m. observed him meet Paschal in the same shopping center as the previous night. After about five minutes Thomas left and Arnold and I followed him to Goza Apartments where he entered Apartment No. 8 at 9:45 a.m. Carter observed Paschal leave at 9:25 a.m. proceeding west on I-20. At 9:52 a.m. Peacock checked Paschal's residence at 3190 Clifton Church Road, S.E., Atlanta, Georgia, and observed the 1963 Ford Fairlane in the drive and Paschal in the yard. At 6:57 p.m. Arnold, Carter and Peacock placed Apartment No. 8, Goza Apartments under surveillance and at 8:05 p.m. observed Thomas leave in his 1959 Chevrolet and proceed to the same shopping center on Wesley Chapel Road and I-20 where he met Paschal in his 1963 Ford Fairlane at 8:20 p.m. and then proceeded to his home at Swan Lake Estates. At 8:56 p.m. Arnold and Peacock checked Paschal's residence, 3190 Clifton Church Road, S.E., Atlanta, Georgia, and observed Paschal's 1963 Ford Fairlane parked there.

On September 1, 1966 Carter, Arnold and Peacock again placed Thomas under surveillance and at 9:25 a.m. observed him meet Paschal in his 1963 Ford Fairlane at Panola Road and I-20 where they remained for about five minutes and then departed. Carter went to Paschal's home and at 9:55 a.m. observed Paschal's 1963 Ford Fairlane parked there. Arnold and Peacock followed Thomas and observed him arrive at Apartment No. 8, Goza Apartments at 9:53 a.m. At 8:05 p.m. they observed Thomas leave Apartment No. 8, Goza Apartments, and proceed to a Stop & Go Market on Wesley Chapel Road near I-20 where he met Paschal driving his 1963 Ford Fairlane. At 8:29 p.m. both men left and at

8:45 p.m. Arnold checked Paschal's residence and observed his 1963 Ford Fairlane parked there. Peacock followed Thomas and observed that he proceeded toward his home at Swan Lake Estates.

On September 2, 1966 at 9:30 a.m. Carter observed Paschal enter the shopping center of Wesley Chapel Road and park his 1963 Ford Fairlane. At 9:32 a.m. a WF driving a 1966 white Oldsmobile, 1966 Georgia Tag 2-J-13382, parked beside him, got out, talked with him and then proceeded toward Atlanta. Paschal left and Carter proceeded to Conyers where at 10:20 a.m. he met Paschal on Covington Road near Goza Apartments. At 3:40 p.m. Carter and Arnold checked Goza Apartments and observed Thomas' 1959 Chevrolet parked there. At approximately 7:00 p.m. Arnold, Carter and Peacock placed Apartment No. 8, Goza Apartments, under surveillance and at 8:06 p.m. observed Thomas leave Apartment No. 8 and followed him to a Majik Market on Wesley Chapel Road near I-20 where he met Paschal driving his 1963 Ford Fairlane. After about 5 minutes both men left with Thomas proceeding south on Snapfinger Road toward his home and Paschal toward his home. Arnold and Carter checked Paschal's residence at 8:35 p.m. and observed Paschal's 1963 Ford Fairlane parked there.

On September 3, 1966 at 10:21 a.m. Peacock observed Thomas' 1959 Chevrolet parked at Goza Apartments. At 6:50 p.m. Arnold and Peacock placed Goza Apartments under surveillance and at 8:06 p.m. observed Thomas leave in the 1959 Chevrolet. He proceeded to an empty Gulf Service Station on Wesley Chapel Road near I-20 where at 8:21 p.m. he met Paschal driving his 1963 Ford Fairlane. At 8:24 p.m. they departed with

Paschal headed north on Wesley Chapel Road and Thomas headed South. At 9:20 p.m. Arnold observed Paschal's 1963 Ford Fairlane parked at his residence.

On September 4, 1966 Arnold and Peacock placed Thomas under surveillance at 8:58 a.m. and followed him until he went to Goza Apartments at 10:02 a.m. At 7:20 p.m. they observed that the 1959 Chevrolet was gone from Goza Apartments.

On September 5, 1966 at 8:55 a.m. Arnold and Peacock observed Thomas in his 1959 Chevrolet meet Paschal in his 1963 Ford Fairlane at the shopping center on Wesley Chapel Road near I-20. At 8:58 a.m. both men departed and at 9:58 a.m. Arnold observed Paschal's 1963 Ford Fairlane parked at his residence. Peacock followed Thomas and at 9:32 a.m. observed his 1959 Chevrolet parked at Goza Apartments. At 7:20 p.m. Arnold observed Thomas' Chevrolet was gone from Goza Apartments.

On September 6, 1966, at 8:48 a.m. Arnold and Carter observed Thomas in his 1959 Chevrolet meet Paschal in his 1963 Ford Fairlane at the same shopping center on Wesley Chapel Road near I-20. At 8:55 a.m. both men left with Paschal going west on I-20 toward his home. Carter checked Paschal's home at 9:20 a.m. and observed the 1963 Ford Fairlane parked there. Arnold followed Thomas and at 9:12 a.m. observed his 1959 Chevrolet parked at Goza Apartments, Conyers, Georgia, and saw Thomas enter Apartment No. 8.

On September 6, 1966 I again checked the records of Southern Bell Telephone and Telegraph Company and found that two private lines, 483-7002 and 483-7014 are still installed in Apartment No. 8, Goza Apartments, Conyers, Georgia, in the name of Jerry Loomis.

On September 7, 1966 I checked the records of District Director of Internal Revenue, Atlanta, Georgia, and determined that neither Robert Eli Stanley nor Jerry D. Paschal have purchased a Special Occupational Tax Stamp-Wagering or registered with the District Director, Atlanta, Georgia, for the fiscal year ending June 30, 1967. Charles A. Thomas, who resides at Swan Lake Estates, RFD, Stockbridge, Georgia, and who spends each day at Apartment No. 8, Goza Apartments, Conyers, Georgia, has made an application for such a stamp, the application being received by the District Director on August 29, 1966, but was mailed from Decatur, Georgia, on August 26, 1966. This application for the period August 29, 1966 to June 30, 1967 lists Thomas' residence address as 261 Broad Street, Augusta, Georgia, and his business address at 261 Broad Street and At Large, Augusta, Georgia. The stamp has not been issued to date.

Special Agent George Guinn has made two inquiries since March 1, 1966 in regard to 261 Broad Street, Augusta, Georgia, and in regard to Charles A. Thomas. He determined that 261 Broad Street is the former home of Frank J. Christian, now deceased, which appears to have been converted to a rooming house. He also determined that there is no listing in the City Directory or in the telephone directory for Charles A. Thomas.

I have been a Special Agent of the Intelligence Division since April, 1953 and have made numerous investigations of wagering activities, including bookmaking. Based on this experience and my knowledge of the method of bookmaking operations, the facts set forth in this affidavit and the affidavits of T. O. Peacock, J. R. Arnold and George A. Carter have convinced me that Robert Eli

Stanley, Jerry D. Paschal and Charles A. Thomas are engaged in the business of accepting wagers on sporting events and are carrying wagering paraphernalia on their persons and are using the premises, 280 Springside Drive, S.E., Atlanta, Fulton County, Georgia, 3190 Clifton Church Road, S.E., Atlanta, DeKalb County, Georgia and Apartment No. 8, Goza Apartments, Conyers, Rockdale County, Georgia to carry on their bookmaking operations.

(Jurat Omitted in Printing)

AFFIDAVIT OF GEORGE A. CARTER

United States of America
Northern District of Georgia } SS

Personally appeared before Frank A. Holden, United States Commissioner, Northern District of Georgia, Atlanta, Georgia, Investigator George A. Carter, Office of Solicitor, Criminal Court of Fulton County, Georgia, who, after being first duly sworn upon his oath, deposes and says:

On August 23, 1966, Agents Arnold, Peacock, Pair, and I maintained a surveillance of the area around Robert Eli Stanley's residence located at 280 Springside Drive, S.E., Atlanta, Georgia, and observed Charles A. Thomas arrive on the premises at 9:35 A.M. driving a 1959 white Chevrolet Impala 4-door. At 8:10 P.M. we observed Thomas leave Stanley's residence and followed him to his home at Swan Lake Estates, RFD, Stockbridge, Henry County, Georgia.

On August 24, 1966, at 8:00 A.M. we placed Thomas' residence under surveillance and at 9:12 A.M. I observed Thomas proceeding west on Ward Lake Road and notified the other agents by radio. Agent Pair and I maintained a periodic mobile surveillance of Stanley's residence and noted that Thomas' Chevrolet remained parked there until dark at which time we discontinued our surveillance.

On August 25, 1966, at 9:00 A.M. Agent Arnold and I set up surveillance of Stanley's residence and at 9:38 A.M. saw Thomas arrive in the 1959 Chevrolet, park in the rear of the house and enter the back door. Several visitors arrived and left during the day and Bob Stanley left in a blue Oldsmobile at 1:23 P.M. Prior to that time he had been in and around the premises

and also had left the premises, for short periods of time and returned. At 1:35 P.M. Thomas left in his Chevrolet and returned at 3:45 P.M. I discontinued this surveillance at 5:00 P.M. at which time Thomas was still on the premises.

On August 26, 1966, at 8:15 A.M. Arnold and I again placed Stanley's residence under surveillance and at 9:26 A.M. observed Thomas arrive in his 1959 white Chevrolet. We discontinued our surveillance at 3:40 P.M. at which time Thomas and Bob Stanley were both still on the premises. Stanley had been in and around the premises throughout the day. At approximately 5:00 P.M. Agent Pair and I began periodic mobile surveillance of Stanley's residence and observed Thomas' Chevrolet still parked there. At 8:55 P.M. we saw Thomas leave the premises in his Chevrolet and proceed toward his home.

On August 29, 1966, Agent Peacock and I placed Stanley's residence under surveillance and at 9:29 A.M. saw Thomas arrive there in his 1959 Chevrolet and enter the rear door of the house. At 10:37 Stanley left in a blue Oldsmobile. We discontinued our surveillance at 4:37 P.M. at which time Thomas was still there.

On August 30, 1966, Peacock and I again placed Stanley's residence under surveillance and at 9:53 A.M. observed Joe Dean Stanley arrive and enter the house. We maintained surveillance until 12:53 P.M. and observed Bob Stanley in and around the premises; however, Thomas did not arrive. At 7:30 P.M. Arnold, Peacock and I placed Apartment 8, Goza Apartments, Conyers, Georgia, under surveillance and at 8:16 P.M. followed Thomas when he left in his 1959 Chevrolet. He proceeded

to a shopping center located on Wesley Chapel Road adjacent to I-20 where at 8:30 P.M. he met Jerry D. Paschal who was driving a 1963 white Ford Fairlane, 1966 Georgia Tag 2-D-25821. After about five minutes both vehicles left with Paschal going west of I-20.

On August 31, 1966, we placed Thomas under surveillance and at 9:15 A.M. observed him meet Jerry D. Paschal in the same shopping center as the previous night. They remained about five minutes and Thomas left. Paschal left at 9:25 A.M. and proceeded west on I-20. At 6:57 P.M. Arnold, Peacock and I placed Apartment 8, Goza Apartments under surveillance and at 8:05 P.M. Thomas left in his 1959 Chevrolet and proceeded to the same shopping center where he met Paschal and then proceeded west on I-20.

On September 1, 1966, Arnold, Peacock and I placed Thomas under surveillance and at 9:25 A.M. observed him meet Paschal in his 1963 Ford Fairlane on Panola Road at I-20 where they remained about five minutes. At 9:55 A.M. I checked Paschal's home at 3190 Clifton Church Road, S.E., Atlanta, Georgia, and observed Paschal's 1963 Ford Fairlane parked there. At 8:05 P.M. we observed Thomas leave Apartment 8, Goza Apartments, Conyers, Georgia, and followed him to Stop & Go Market on Wesley Chapel Road near I-20 where he met Paschal in his 1963 Ford Fairlane. At 8:29 P.M. both men left.

On September 2, 1966, at 9:30 A.M. I observed Paschal enter the shopping center on Wesley Chapel Road and park his 1963 Ford Fairlane. At 9:32 A.M. a white female in a white Oldsmobile 2-J-13382 parked beside him, got out, talked with him and then proceeded toward Atlanta. Paschal left and I proceeded to Conyers

where at 10:20 A.M. I met him on Covington Road near Goza Apartments. At 3:40 P.M. Arnold and I checked Goza Apartments and observed Thomas' 1959 Chevrolet parked there. At approximately 7:00 P.M. Arnold, Peacock and I placed Apartment 8, Goza Apartments under surveillance and at 8:06 P.M. observed Thomas leave Apartment 8 and proceed to a Majik Market on Wesley Chapel Road near I-20 where he met Paschal in his 1963 Ford Fairlane. After several minutes both men left with Thomas proceeding south on Snapfinger Road and Paschal toward his home. At 8:35 P.M. Arnold and I observed Paschal entering his home at 3190 Clifton Church Road.

On September 6, 1966, Agent Arnold and I observed Thomas arrive at the same shopping center on Wesley Chapel Road near I-20 at 8:30 A.M. and 8:48 A.M. Paschal in his 1963 Ford Fairlane parked beside him and got in the car with Thomas. At 8:55 A.M. Thomas left toward the Covington Highway and Paschal went west on I-20. At 9:20 A.M. I checked Paschal's home at 3190 Clifton Church Road, S.E., Atlanta, Georgia, and observed Paschal's 1963 Ford Fairlane parked there.

I have been an enforcement officer in the Atlanta area for 25 years and have made numerous investigations involving gambling, including bookmaking. Based on this experience and my knowledge of the operation of a bookmaking business, the facts other investigators and I witnessed in this investigation and which are a part of this affidavit and the affidavits of J. R. Arnold, T. O. Peacock, and W. A. Pair, I am convinced that Robert Eli Stanley, Jerry D. Paschal, and Charles A. Thomas are operating a bookmaking business and are using their persons to conceal bookmaking paraphernalia and are

using the premises 3190 Clifton Church Road, S.E., Atlanta, DeKalb County, Georgia, 280 Springside Drive, S.E., Atlanta, Fulton County, Georgia, and Apartment 8, Goza Apartments, Conyers, Rockdale County, Georgia, to carry on this business.

(Jurat Omitted in Printing)

AFFIDAVIT OF T. O. PEACOCK

UNITED STATES OF AMERICA }
NORTHERN DISTRICT OF GEORGIA } SS

Personally appeared before Frank A. Holden, United States Commissioner, Northern District of Georgia, Atlanta, Georgia, Special Agent T. O. Peacock, Intelligence Division, Internal Revenue Service, Atlanta, Georgia, who, after first having been duly sworn, upon his oath deposes and says:

On May 20, 24, 25, 26, 27, 1966, I participated with Special Agent Pair in surveillance of Jerry D. Paschal and Apartment 8, Goza Apartments, Conyers, Georgia. On most of these days between 9:00 and 10:00 a.m. I observed Paschal driving a 1963 white Ford Fairlane arrive at a negro house on Lester Road, Conyers, Georgia, park the Ford, enter a 1951 blue Ford with white top and depart. Later each day I observed the 1951 Ford parked at Goza Apartments and between 1:30 and 2:00 p.m. observed Paschal leave Apartment No. 8 by the rear door, burn some trash and then leave in the 1951 blue Ford. On May 25, 26, 27, 1966, I observed Charles A. Thomas arrive at the Goza Apartments in a 1959 white Chevrolet and enter Apartment No. 8. On May 26, 1966, Pair and I determined that Thomas resided at Apartment No. 4, 1795 Pryor Road, S.E., Atlanta, Georgia, and at 10:37 a.m. observed his 1959 white Chevrolet 89-J-1515 parked at that address. On May 31, 1966, I observed that there was no activity at Apartment No. 8, Goza Apartments, Conyers, Georgia, and also observed that Thomas' 1959 Chevrolet was parked at Apartment No. 4, 1795 Pryor Road, S.E., Atlanta, Georgia, and now carried 1966 Georgia Tag No. 1-J-48402.

On August 1, 2, 3, 4, 5, 8, 12, 13, 15, 16, 19, 20, 1966, I conducted a periodic mobile surveillance of Robert Eli Stanley's residence at 280 Springside Drive, S.E., Atlanta, Georgia, and observed that Charles A. Thomas' 1959 white Chevrolet Impala, 4 door, 1966 Georgia Tag 1-J-48402, arrived at that location each day at approximately 9:30 a.m. and remained there all day.

On August 22, 1966, Agent Pair and I observed Thomas arrive at Stanley's residence in the 1959 Chevrolet at 9:29 a.m. and remained there all day.

On August 23, 1966, Agents Pair, Arnold, Investigator Carter and I maintained surveillance of the area around Stanley's residence and observed Thomas arrive there at 9:35 a.m. At 8:10 p.m. we observed Thomas leave the premises and followed him to Swan Lake Estates, RFD No. 1, Stockbridge, Georgia.

On August 24, 1966, at 8:00 a.m., we placed Thomas' residence at Swan Lake Estates, RFD Stockbridge, Georgia under surveillance and observed him leave in his 1959 Chevrolet and proceed to Stanley's residence. We maintained periodic surveillance of Stanley's residence until 7:00 p.m. when Thomas was still there.

On August 25, 1966, at 8:25 p.m. I observed Thomas leave Stanley's residence in his 1959 white Chevrolet and proceed to his residence at Swan Lake Estates, Stockbridge, Georgia.

On August 27, 1966, at 3:25 p.m. I observed Thomas' 1959 Chevrolet parked at Stanley's residence.

On August 29, 1966 Investigator George A. Carter and I placed Stanley's residence under surveillance and at 9:29 a.m. saw Thomas arrive in his 1959 Chevrolet and enter the rear door. At 10:37 a.m. Stanley left in

a blue Oldsmobile. We discontinued our surveillance at 4:37 p.m., at which time Thomas was still there. At 8:23 p.m. Arnold and I observed Thomas in his 1959 Chevrolet leave Springside Drive, S.E. and proceed south on Jonesboro Road.

On August 30, 1966, Carter and I again placed Stanley's residence under surveillance and at 9:53 a.m. observed Joe Dean Stanley arrive and enter the house. We maintained surveillance until 12:53 p.m. and observed Bob Stanley in and around the premises, however Thomas did not arrive. At 7:30 p.m. Arnold, Carter and I placed Apartment No. 8, Goza Apartments, Conyers, Georgia, under surveillance and at 8:16 p.m. observed Thomas leave Apartment No. 8 and proceed in his 1959 Chevrolet to a shopping center located on Wesley Chapel Road adjacent to I-20 where at 8:30 p.m. he met Jerry D. Paschal who was driving a 1963 white Ford Fairlane, 1966 Georgia Tag 2D25821. After about 5 minutes both vehicles left with Paschal going west on I-20.

On August 31, 1966 at 9:52 a.m. I observed Paschal's 1963 Ford Fairlane in the drive at 3190 Clifton Church Road, S.E., Atlanta, Georgia. At that time Paschal was in the yard at the premises. At 6:57 p.m. Arnold, Carter and I placed Apartment No. 8, Goza Apartments, Conyers, Georgia, under surveillance and at 8:05 p.m. Thomas left in his 1959 Chevrolet and proceeded to the same shopping center on Wesley Chapel and I-20 where he met Paschal and then proceeded to his home at Swan Lake Estates. At 8:56 p.m. I checked Paschal's residence at 3190 Clifton Church Road, S.E. and observed his 1963 Ford Fairlane parked there.

On September 1, 1966, Arnold, Carter and I again

placed Thomas under surveillance and at 9:25 a.m. I followed him to Panola Road where he met Paschal in the 1963 Ford Fairlane and then proceeded to Conyers and to Apartment No. 8, Goza Apartments, where he arrived at 9:53 a.m. At 8:05 p.m. Arnold, Carter and I observed Thomas leave the apartment and followed him to Stop & Go Market on Wesley Chapel Road near I-20 where he met Pashcal driving his 1963 Ford Fairlane. At 8:29 p.m. both men left and I followed Thomas toward his home at Swan Lake Estates.

On September 2, 1966, at 7:00 p.m., Arnold, Carter and I placed Goza Apartments under surveillance and at 8:06 p.m. observed Thomas leave Apartment No. 8 and followed him to a Majik Market on Wesley Chapel Road near I-20 where he met Paschal in his 1963 white Ford Fairlane. After about five minutes both men left going in the direction of their homes.

On September 3, 1966, at 10:21 a.m., I observed Thomas' 1959 Chevrolet parked in the tenant's parking lot at Goza Apartments, Conyers, Georgia. At 6:50 p.m. Arnold and I placed Goza Apartments under surveillance and at 8:03 p.m. observed Thomas leave Apartment No. 8 and proceed to an empty Gulf Service Station on Wesley Chapel Road near I-20 where he met Paschal and then both men left with Thomas proceeding toward his home. At 9:20 p.m. I observed Paschal's 1963 Ford Fairlane parked in the driveway at his residence, 3190 Clifton Church Road, S.E., Atlanta, Georgia.

On September 4, 1966, I observed Thomas on Highway No. 155 and followed him until he went to Goza Apartments at 10:02 a.m.

On September 5, 1966, at 8:30 a.m. I observed

Thomas in his 1959 Chevrolet and followed him to the shopping center parking lot on Wesley Chapel Road adjacent to I-20 where he met Paschal in his 1963 Ford Fairlane at 8:56 a.m. After about 5 minutes both men left and at 9:32 a.m. I observed Thomas' 1959 Chevrolet at Goza Apartments, Conyers, Georgia, and at 10:02 a.m. observed Paschal's 1963 Ford Fairlane at his residence, 3190 Cliftoh Church Road, S.E., Atlanta, Georgia.

(Jurat Omitted in Printing)

AFFIDAVIT OF JAMES R. ARNOLD

UNITED STATES OF AMERICA
NORTHERN DISTRICT OF GEORGIA } SS

Personally appeared before Frank A. Holden, United States Commissioner, Northern District of Georgia, Atlanta, Georgia, James R. Arnold, Special Agent, Internal Revenue Service, Atlanta, Georgia, who after first having been duly sworn, upon his oath deposes and says:

On August 23, 1966, Agents Pair, Peacock, Investigator Carter and I maintained a surveillance of Stanley's residence, 280 Springside Drive S.E., Atlanta, Georgia, and observed Charles A. Thomas arrive there at 9:35 A.M. At 8:10 P.M., we observed Thomas driving a 1959 white Chevrolet leave Stanley's residence and followed him to Swan Lake Estates, RFD No. 1, Stockbridge, Georgia.

On August 24, 1966 at 8:00 A.M., we placed Thomas' residence at Swan Lake Estates, RFD, Stockbridge, Georgia under surveillance and observed him leave driving a 1959 white Chevrolet Impala, 4-door, 1966 Georgia Tag 1-J-48402 heading west on Wards Lake Road. Agents Pair, Peacock, Investigator Carter and I followed him to the home of Robert Eli Stanley where I observed him turn into the driveway of Stanley's house at 9:40 A.M. At 1:17 P.M., 2:34 P.M., and 3:34 P.M., I observed that Thomas' 1959 white Chevrolet Impala was parked in the rear of Stanley's house.

On August 25, 1966 at 9:00 A. M., Investigator Carter and I started a surveillance of the premises of Stanley's house. At 9:38 A.M., I observed Thomas driving a 1959 white Chevrolet Impala, 4-door, arrive and park in the rear of Stanley's house and immediately enter the rear door of the house. At 1:23 P.M., Stanley

driving a 1965 blue Oldsmobile, 4-door, departed the premises and did not return while the house was under surveillance. Prior to his departure he was seen in and around the premises. At 1:35 P.M., I observed Thomas driving the 1959 white Chevrolet Impala leave Stanley's premises. At 3:45 P.M., I observed that Thomas driving the 1959 white Chevrolet Impala arrive at Stanley's house, park in the rear of the house and enter through a rear door. At 8:35 P.M., I observed Thomas driving the 1959 white Chevrolet on the Old Jonesboro Road and followed him nearly to his home.

On August 26, 1966 at 8:15 A.M., Investigator Carter and I started a surveillance of the premises of Stanley's house. At 9:26 A.M., Thomas arrived in the 1959 white Chevrolet Impala, 4-door and went directly into the house, through the rear door. During the period of this surveillance, Robert Eli Stanley was observed in and around the premises.

On August 29, 1966, at 8:23 P.M., I observed Thomas driving the 1959 white Chevrolet Impala at the intersection of the Old Jonesboro Road and Springside Drive where he made a right turn and headed south on the Old Jonesboro Road.

On August 30, 1966 at 10:30 A.M., Agent Pair and I located Thomas' 1959 white Chevrolet Impala parked in the parking area of the Goza Apartments, Conyers, Georgia. At 1:48 P.M., 2:48 P.M., 3:48 P.M., 4:48 P.M., 5:48 P.M., and 6:48 P.M., Agent Peacock, Investigator Carter and I checked the apartment parking area and found Thomas' 1959 white Chevrolet still there. At 8:16 P.M., Agent Peacock, Investigator Carter and I observed Thomas in the 1959 white Chevrolet coming out of the parking area of the apartments. We followed

him west on I-20 where he drove into the Big Apple Supermarket parking area on Wesley Chapel Road adjacent to the I-20 exit. At 8:30 P.M., Thomas met Jerry D. Paschal driving a 1963 white tudor Ford bearing Georgia License Number 2-D-25821. At 8:34 P.M., both Thomas and Paschal departed the area, Paschal headed west on I-20 with Thomas going into the Texaco Service Station on Wesley Chapel Road.

On August 31, 1966, Agent Pair and Investigator Carter observed Thomas heading North on Highway 155 where we followed him to the parking area of the Big Apple Supermarket on Wesley Chapel Road. At 9:15 A.M., Thomas met Paschal who was driving a 1963 Ford Fairlane Tudor. At 9:20 A.M., Thomas left the parking area and headed east on Interstate 20 driving the 1959 white Chevrolet, 4-door, arriving at the Goza Apartments, Conyers, Georgia at 9:43 A.M. At 10:08 A.M., Agent Pair and I observed that a 1963 Ford Fairlane Tudor bearing license number 2-D-25821 was parked in the carport of a house located at 3190 Clifton Church Road. At 6:57 P.M., Agent Peacock, Investigator Carter and I placed the Goza Apartments, Conyers, Georgia under surveillance and at 8:05 P.M., we observed Thomas driving the 1959 white Chevrolet driving west on Interstate 20. We followed him to a shopping center located at the intersection of Wesley Chapel Road and Interstate 20 where he met Paschal driving the 1963 Ford Fairlane (white) at 8:20 P.M. At 8:25 P.M., Thomas and Paschal departed the shopping center and Agent Peacock and I followed Thomas to the intersection of Highway 155 and Wards Lake Road where Thomas turned right. At 8:56 P.M., we checked Paschal's house at 3190 Clifton Church

Road and found the 1963 white Ford Fairlane 2-D-25821 parked in the carport.

On September 1, 1966 at 7:42 A.M., Thomas was placed under surveillance by Agent Peacock; Investigator Carter and I. At 9:03 A.M., we followed Thomas north on Highway 155 then on to Snapfinger Road where he made a right turn onto Wesley Chapel Road. Thomas proceeded on to Interstate 20 where he headed east. Thomas got off Interstate 20 at the Panola Road exit where we observed him meet a white male at 9:25 A.M. Thomas then continued East on Interstate 20 and exited I-20 at the West Avenue Exit at Conyers, Georgia and then proceeded to the Colonial Store shopping area on West Avenue, Conyers, Georgia. I observed Thomas going into the Colonial Store at 9:38 A.M. At 9:48 A.M., I saw Thomas come out of the Colonial Store where he entered his car and proceeded west on the Access Road. Agent Peacock and I followed Thomas to the Goza Apartments, Conyers, Georgia, where he went in at 9:53 A.M. At 8:05 P.M., Investigator Carter and I observed Thomas driving the 1959 white Chevrolet Impala leaving the Goza Apartments and proceeding west on I-20 where he exited at the Wesley Chapel Road Exit and proceeded to a Stop & Go Market on Wesley Chapel Road where he met Paschal. At 8:29 P.M., both departed the Stop & Go Market. At 8:45 P.M., I observed that the 1963 Ford Fairlane (white) (2-D-25821) was parked in the carport of 3190 Clifton Church Road.

On September 2, 1966, at 3:40 P.M., Investigator Carter and I observed that the 1959 white Chevrolet Impala, 4-door, was parked in the parking area of the Goza Apartments, Conyers, Georgia. At 8:08 P.M., Agent Peacock, Investigator Carter and I observed

Thomas coming out of the Goza Apartments and enter his 1959 white Chevrolet and proceed west on I-20. We followed him to the Snapfinger Road Exit where he proceeded to the Majik Market on Wesley Chapel Road near I-20, where he met Paschal in a 1963 white Ford Fairlane. At 8:23 P.M., Investigator Carter and I observed that Paschal headed west on I-20 where we followed him to his home at 3190 Clifton Church Road, Atlanta, Georgia and observed him going into his house at 8:36 P.M.

On September 3, 1966, Agent Peacock and I at 6:48 P.M., placed the Goza Apartments under surveillance and at 8:03 P.M., we saw Thomas driving the 1959 white Chevrolet leave. We followed him west on I-20 where he met Paschal at 8:21 P.M. in a vacant Gulf Service Station on Wesley Chapel Road adjacent to I-20. At 8:24 P.M., Thomas and Paschal departed with Thomas headed south on Wesley Chapel Road and Paschal headed north. At 9:20 P.M., I observed that the 1963 white Ford Fairlane was parked in the carport at 3190 Clifton Church Road, Atlanta, Georgia.

On September 4, 1966, Agent Peacock and I at 8:58 A.M. followed Thomas to the Royal Castle on Candler Road. At 9:28 A.M., we observed Thomas going south on Candler Road, and at 10:02 A.M., we observed that Thomas' 1959 white Chevrolet Impala was parked at the Goza Apartments, Conyers, Georgia. At 7:20 P.M., Peacock and I observed that the 1959 Chevrolet was gone from the parking area of the Goza Apartments.

On September 5, 1966, Agent Peacock and I at 8:36 A.M., followed Thomas to the Big Apple Shopping Center on Wesley Chapel Road adjacent to I-20 where at 8:55 A.M., he met Paschal. At 8:58 A.M., we ob-

served that both departed the parking area and headed north on Wesley Chapel Road. At 9:58 A.M., I observed the 1963 white Ford Fairlane in the carport at 3190 Clifton Church Road. At 7:20 P.M., I observed that Thomas' 1959 white Chevrolet was gone from the parking area of the Goza Apartments, Conyers, Georgia.

On September 6, 1966, Agent Peacock, Investigator Carter and I placed Highway 155 and the Big Apple Shopping Center on Wesley Chapel Road under surveillance. At 8.28 A.M., Thomas driving the 1959 white Chevrolet passed my location on Highway 155 headed north. I followed him to the Big Apple Shopping Center, where he met Paschal at 8:48 A.M. At 8:55 A.M., we observed that Thomas headed north on the Wesley Chapel Road and Paschal headed west on I-20. At 9:12 A.M., I saw the 1959 white Chevrolet in the parking area of the Goza Apartments and Thomas entering Apartment No. 8.

On September 6, 1966, I checked the records of District Director of Internal Revenue, Atlanta, Georgia and found that neither Robert E. Stanley nor Jerry D. Paschal has purchased a Special Occupational Tax Stamp-Wagering or registered with the District Director for the fiscal year ending June 30, 1967. Charles A. Thomas has submitted an application for such a stamp indicating an address of 261 Broad Street, Augusta, Georgia however the stamp has not been issued. No person has purchased such a stamp or made application for such a stamp for the year ending June 30, 1967 using 280 Springside Drive, S.E., Atlanta, Fulton County, Georgia, 3190 Clifton Church Road S.E., Atlanta, DeKalb County, Georgia

or Apartment No. 8; Goza Apartments, Conyers, Georgia as a business or residence address.

(Jurat Omitted in Printing).

* * * *

FULTON SUPERIOR COURT

(Title Omitted in Printing)

ORDER OVERRULING AND DENYING MOTION TO SUPPRESS EVIDENCE

The motion to suppress evidence in the above stated case having come on regularly for hearing before this Court on January 17, 1967, and the Court having received and considered evidence, stipulations of fact, and statements and arguments of law by counsel for both the State of Georgia and the defendant, prior to the selection of a traverse jury and outside the presence of any prospective traverse juror, finds as a matter of fact that the evidence sought to be suppressed was seized by Investigator George A. Carter of the Solicitor's Office, Criminal Court of Fulton County, Georgia, in the home of the defendant ROBERT ELI STANLEY during the course of a joint search of said dwelling on September 7, 1966, by Special Agents, Intelligence Division, Internal Revenue Department and Investigator Carter, by authority of a Federal search warrant issued by United States Commissioner Frank A. Holden, Northern District of Georgia, authorizing the search of said dwelling for certain bookmaking records particularly described therein. The lawfulness and sufficiency of said search warrant and affidavits upon which the search warrant was issued were not attacked or questioned by the defense and the Court finds as a matter of law that said warrant was a valid search warrant issued upon sufficient probable cause.

The Court finds further that during the course of said search said officers discovered three rolls of motion picture film in the bedroom of the defendant, placed said film in a movie projector, and showed said motion

pictures. Investigator Carter observed that said films depicted nude men and women engaged in acts of sexual intercourse and sodomy. Thereafter, said films were seized by Investigator George A. Carter as contraband, being obscene matter possessed by said defendant in violation of Section 26-6301 as amended, Code of Georgia Annotated, and the defendant ROBERT ELI STANLEY was placed under arrest by Investigator Carter.

The Court therefore holds as a matter of law that the initial search of said dwelling by said State and Federal officers was lawful, conducted under the authority of a valid Federal Court search warrant, and that the subsequent seizure of the films while in the process of effecting said lawful search was likewise lawful, said film being an item and substance the possession of which is unlawful under the laws of the State of Georgia, to-wit, Section 26-6301, as amended, Code of Georgia Annotated. See Section 3 (e) Georgia Search and Seizure Act of 1966; *Cash v. State*, 222 Ga. 55; *Harris v. U.S.*, 331 U.S. 145; *Palmer v. U.S.*, D.C. Cir. 1953, 203 Fed. 2d 1966.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Motion to Suppress Evidence be and the same is hereby overruled and denied.

This 17th day of January, 1967.

(Certificate of Filing and Signature of Judge Omitted in Printing)

* * * *

FULTON SUPERIOR COURT

VERDICT

We The Jury find the defendant guilty as charged and we fix the punishment at 1 year and recommend however punishment as a misdemeanor.

Dated January 19, 1967

(Signature of Jury Foreman and Certificate of Filing Omitted in Printing)

* * * *

SENTENCE:

Charge Possession of Obscene Matter

Fulton Superior Court

(Title Omitted in Printing)

WHEREUPON, It is ordered and adjudged by the Court that the Defendant, Robert Eli Stanley be taken from the Bar of this Court to the Jail of Fulton County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by said guard taken to said Penitentiary, or to such other place as the Director of Corrections may direct, where he, the said defendant be confined at labor for the full term (1) one year to be computed according to law.

By the Court January 19, 1967

(Signatures of Judge and Solicitor General and Certificate of Filing Omitted in Printing)

FULTON SUPERIOR COURT

(Title Omitted in Printing)

NOTICE OF APPEAL

Notice is hereby given that ROBERT ELI STANLEY, DEFENDANT ABOVE NAMED, hereby appeals to the Supreme Court of Georgia from the judgment of conviction and sentence entered herein on January 19th, 1967.

The offense for which defendant was convicted is Possession of Obscene Matter, and the sentence imposed is as follows: One year imprisonment in the Penitentiary.

Motion for new trial was filed and overruled on November 20, 1967.

The clerk will please omit the following from the record on appeal:

Nothing.

Transcript of evidence and proceedings has been filed for inclusion in the record on appeal.

The Supreme Court of Georgia has jurisdiction of this appeal, and not the Court of Appeals, because this case and this appeal involves the construction of the

Constitution of the United States and the constitutionality of a law of the State of Georgia is drawn in question.

Dated this 14th day of December, 1967.

(Signature and Address of Counsel and Certificate of Service Omitted in Printing)

* * * *

SUPREME COURT OF GEORGIA

(Title Omitted in Printing)

ENUMERATION OF ERRORS

The appellant relies upon the following errors as the basis for his appeal:

1.

The trial court erred in overruling the motion to suppress evidence.

2.

The trial court erred in overruling the general demurrer to the indictment.

3.

The trial court erred in overruling the first ground of the general demurrer contending that the indictment failed to set forth a valid offense against the laws of Georgia.

4.

The trial court erred in overruling the second ground of the general demurrer to the indictment.

5.

The trial court erred in holding the Act of the General Assembly of 1963, p. 78, to be constitutional and not in conflict with the First and Fourteenth Amendments to the United States Constitution, as had been raised in the third ground of the general demurrer.

6.

The Court erred in overruling the special demurrer filed by the Appellant.

7.

The Court erred in overruling the plea in abatement filed by the Appellant.

8.

The evidence did not support the verdict in that the State failed to prove that the appellant exhibited the alleged obscene films to any other person.

9.

The evidence did not support the verdict in that the State failed to prove the element of scienter or that the appellant knew of the obscene nature of such films.

JURISDICTION

The Supreme Court has jurisdiction of this appeal for the reason that the constitutionality of a law of the State of Georgia is drawn in question. (Georgia Constitution of 1945, Article VI, Sec. 2, Par. IV, (Code 2-3704.)

(Signature and Address of Counsel and Certificate of Service Omitted in Printing.)

* * * *

OPINION OF GEORGIA SUPREME COURT

Apr. 9, 1968

IN THE SUPREME COURT OF GEORGIA.
24484. STANLEY v. THE STATE 708

FRANKUM, Justice. Robert E. Stanley was convicted of the offense of possessing obscene matter under an indictment framed under the provisions of Code § 26-6301. He appealed. Jurisdiction of the appeal is in this court by reason of two attacks by demurrer upon the constitutionality of the law under which the defendant was indicted and tried. The demurrer was overruled by the trial court and the appellant enumerates that judgment and other rulings of court as error. We will deal with the enumerations of error in the order in which they are made.

1. Appellant made a motion to suppress evidence to-wit: the three rolls of motion picture film seized by the officers while conducting a search of the appellant's premises. It appeared that special agents of the intelligence division of the U. S. Internal Revenue Service and an investigator from the Solicitor General's Office of Fulton County, acting under authority of a Federal Search Warrant issued by the U.S. Commissioner authorizing the search of the defendant's dwelling for certain bookmaking records particularly described in the warrant, while conducting the search discovered three rolls of motion picture film in the bedroom of the defendant, placed said film in a projector, showed said pictures and observed that said films depicted nude men and women engaged in acts of sexual intercourse and sodomy. The investigator seized said films as being

contraband obscene matter possessed by the defendant in violation of Sec. 26-6301 of the Georgia Code as amended and placed the defendant under arrest on that charge. The defendant moved to suppress the evidence on the ground that its seizure violated his constitutional rights in that it was seized under a warrant not specifically describing the thing to be seized, and before this court he relies principally upon the case of Marcus v. Search Warrant, 367 U.S. 717 (____ L. Ed.____, ____ Sup. Ct. ____). That case is clearly distinguishable from this case. The basis of the decision in that case was that the warrant under which the seizure of the lewd and pornographic material was had was not specific as to any property to be seized and was therefore a void warrant. Thus the search and seizure there was illegal ab initio. In this case it was specifically held by the trial court, in overruling the motion to suppress, that the warrant and the search thereunder were legal, and in so ruling the trial court committed no error. In Georgia "when the peace officer is in the process of effecting a lawful search," he may discover or seize "any stolen or embezzled property, any item, substance, object, thing or matter, the possession of which is unlawful, or any item, substance, object, thing or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of the State of Georgia." (Ga. L. 1966, pp. 567, 568; Ga. Code Anno. Suppl. Sec. 27-303 (e). Such seizure as was had in this case has been expressly held not to be a violation of constitutional guarantees either State or Federal. Cash v. State, 222 Ga. 55, 58 (____S.E.____); Harris v. U.S., 331 U.S.

145 (____L.Ed.____; Sup. Ct.); Palmer v. U.S. (CCA, DC), 203 Fed. 2d 66; Johnson v. U.S. (CCA, DC), 293 Fed. 2d 539; U.S. v. Eisner (CCA 6) 297 Fed. 2d 595).

Even if it be said that the ruling made in the Marcus case is, in terms, broad enough to encompass the seizure of the lewd, lascivious and pornographic material involved in this case, it must be observed that the ruling made in that case was made with relation to and in the context of Constitutional guarantees of freedom of the press and freedom of speech. Here no such question is involved. There is no merit to the appellant's contention in this regard and the trial court did not err in overruling the motion to suppress the evidence.

2. The indictment in this case which charged that the defendant on a specified date "did knowingly have possession of obscene matter," thereafter describing three rolls of motion picture film in detail and concluding with the allegation: "said accused having knowledge of the obscene nature of such motion picture film and matter; said motion picture films when considered as a whole and applying contemporary community standards that exist in this county, being obscene matter whose predominant appeal is to a shameful and morbid interest in nudity and sex; and accused should reasonably have known of the obscene nature of said matter, said act of accused being contrary to the laws of said state, the good order, peace and dignity thereof," sufficiently charged the defendant with an offense under the provisions of Code Sec. 26-6301, as amended by the act approved March 13, 1963 (Ga.

L. 1963, p. 78 et seq.). It is not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was "with intent to sell, expose or circulate the same."

3. The contention that the act approved March 13, 1963, is unconstitutional, null and void on its face in that it was passed and enacted by the general assembly of Georgia as an amendment to a code section which had previously been declared to be unconstitutional (Simpson v. State 218 Ga. 337 (____ S.E.____) is without merit. Section 1 of the 1963 Act clearly states that "Code Chap. 26-63 . . . as amended, particularly by an Act approved March 17, 1956 (Ga. L. 1956, p. 801), is hereby amended . . ." The 1956 Act had in a similar fashion amended Chapter 26-63 by striking therefrom Code Sec. 26-6301 and inserting in lieu thereof a new section to be numbered Section 26-6301 and it was that section as reenacted in 1956 which was held to be unconstitutional in Simpson v. State supra. The fact that the 1963 Act particularized the portion of Code Chap. 26-63 to be amended and referred to Sec. 26-6301 and further provided that the Chapter, should be amended by striking that code section in its entirety (which was the effect of this court's ruling in the Simpson case) in no way vitiated the effect of the act to amend Code Chap. 26-63.

4. Defendant contended in the 3rd ground of his general demurrer to the indictment that the law under which he was indicted is unconstitutional, null and void as in conflict with the first and 14th Amendments to the Constitution of the United States guaranteeing freedom of the press and due process of

law in that it seeks to punish persons charged with the violation of the law if they reasonably should know of the obscene nature of such matter, it being contended that the requirement of reasonable knowledge would withdraw the element of scienter from the definition of the offense and would render a person guilty without actual knowledge of the obscene nature of the matter. This contention is without merit. As we construe the statute the language "if such person has knowledge or reasonably should know of the obscene nature of such matter," merely amounts to a statutory expression of a rule of evidence which has been extant in this state over many years. Whether a person has knowledge of a fact is a matter peculiarly within the mind of such person, and it is rarely if ever that the defendant's guilty knowledge is susceptible of direct proof. For this reason this court has adhered to the principle that guilty knowledge may be shown by circumstances as well as by actual and direct proof. Rivers v. State, 118 Ga. 42 (2) (___S.E.___); Birdsong v. State, 120 Ga. 850, 852 (3) (____S.E.____). Therefore, if the evidence shows that the defendant knowingly possessed matter which is obscene and that he reasonably should have known of its obscene nature, and this latter fact is shown by circumstances relating to the way and manner in which he came into the possession of the matter or relating to the length of time he has had possession of it, coupled with a showing that such defendant is sufficiently informed as to the community standards as to be chargeable with knowledge of the obscene nature of the matter then he can be convicted even though direct proof of his actual knowledge of the obscene nature of the

matter is incapable of being produced. The statute is therefore not unconstitutional for any of the reasons urged and the trial court did not err in overruling the general and special demurrers of the defendant in which sought to raise this issue.

5. Appellant filed a plea in abatement in which he made the contention that since the matter he was charged with possessing had not been declared to be obscene by a court of competent jurisdiction in accordance with the provision of the act approved March 3, 1964 (Ga. L. 1964, p. 161-65; Code Ann. Suppl. Chap. 26-63A) as required by Section 2 of the Act approved April 1, 1965 (Ga. L. 1965, p. 489) that he could not be prosecuted for merely possessing the films in question. This contention is without merit. The provisions of Section 2 of the Act of 1965 apply only to that act, that is, to the provisions of Section 1 of the 1965 Act which added a new section to be known as Code Sec. 26-6301.1 and those provisions do not apply to Code Sec. 26-6301 under which the appellant was prosecuted. Furthermore the provisions of the 1965 Act apply only to pornographic literature, and the matter for the possession of which the defendant was prosecuted in this case was in no sense literature as that term is defined by recognized authorities. See, for example, Websters New World Dictionary of the American Language, p. 856.

6. The evidence authorized the verdict and no error of law appearing the judgment will be affirmed.

Judgment affirmed. All the Justices concur.

JUDGMENT OF GEORGIA SUPREME COURT

24484

SUPREME COURT OF GEORGIA

Atlanta, April 9, 1968

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Robert Eli Stanley v. The State.

This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of Costs, $30.00

* * * *

SUPREME COURT OF GEORGIA

(Title Omitted in Printing)

MOTION FOR REHEARING

Now comes Appellant, Robert Eli Stanley, within ten days after the judgment of affirmance, and moves the Court for a rehearing on the following grounds:

1.

This Court erred in holding and deciding that "There is no contention here that the warrant is void but on the contrary it was specifically held by the trial court, in overruling the motion to suppress, that the warrant and the search thereunder were legal, and no enumeration of error complaining of that ruling was filed by the appellant", and by such holding overlooked the following portions of the record that are material to this question and which require a different ruling, to-wit:

(a) Paragraph 1 of the motion to suppress filed by the appellant in the trial court, alleging that the articles were seized "without a lawful search warrant particularly describing said articles to be seized." (See supplemental certified record transmitted by trial court clerk under order of Superior Court of Fulton County dated February 16, 1968.)

(b) Enumeration of error No. 1 complaining of the overruling of the motion to suppress.

(c) Third Supplementary Brief for the Appellant pointing out this particular addition to the certified record and the recent decisions of the Supreme Court of the United States in

Marchetti v. United States,

No. 2—October Term, 1967, and

Grosso v. United States,

No. 12, October Term, 1967,

holding the federal statutes under which the search warrant had been issued in this case to be constitutionally unenforceable, and also holding that even the failure of the petitioner to assert the claim of privilege was not a waiver of his right to relief in the appellate court.

2.

This Court erred in holding in this case, as follows:

"Even if it be said that the ruling made in the Marcus case is, in terms, broad enough to encompass the seizure of the lewd, lascivious and pornographic material involved in this case, it must be observed that the ruling made in that case was made with relation to and in the context of Constitutional guarantees of freedom of the press and freedom of speech. Here no such question is involved but the only question presented by the appellant in this regard is whether the search warrant under which the seizure of the material here in question was made authorized the seizure of anything other than gambling paraphernalia."

This Court, in so holding and deciding, overlooked certain portions of the record in this case as follows:

(a) Paragraph 2 of the motion to suppress, alleging that the articles seized were in violation of appellant's "rights as guaranteed by the First Amendment to the United States Constitution providing for *freedom of press.*" (See Supplemental certified record transmitted by trial court clerk under Superior Court order dated February 16, 1968.)

3.

This Court erred in holding and deciding that the law under which the appellant was indicted did not offend the First and Fourteenth Amendments to the United States Constitution in removing the element of scienter from the offense by punishing the mere possession of an article alleged to be obscene "if they reasonably should know of the obscene nature of such matter."

In so deciding, this Court overlooked the following decisions of the Supreme Court of the United States, being binding as authority on this Court, to-wit:

Redrup v. New York,

Austin v. Kentucky and

Gent v. Arkansas,

87 S.Ct. 1414, Nos. 3, 16 and 50

October Term, 1966, and also

Smith v. California, 361 U.S. 147.

This Court, in so holding and deciding, overlooked the fact in this case that none of the following three elements, deemed essential and necessary by the Supreme Court of the United States in the above cited cases, were present in the record here, to-wit:

(a) The reflection by the statute of a *specific* and *limited* state concern for juveniles, or

(b) an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it, or

(c) evidence of the sort of "pandering" which the Supreme Court of the United States found significant in Ginzburg v. United States, 383 U.S. 463.

Movant respectfully submits that this Court, in not referring to the decisions of the Supreme Court of the United States hereinbefore cited, overlooked said decisions which are controlling upon the question involved and require a different holding than that rendered by the Court.

4.

This Court erred in holding and deciding that the evidence authorized the verdict and in so holding, overlooked the fact that there is no evidence in the record to show that the appellant had *knowledge* that the films were obscene, or that he had ever viewed them, and for such reasons the verdict is contrary to the holding of the Supreme Court of the United States in the cases of:

Redrup v. New York, supra,

Austin v. Kentucky, supra, and

Gent v. Arkansas, supra,

in that this Court, in upholding a conviction in a criminal case based upon a verdict founded upon no evidence of knowledge by the appellant of the obscene nature of the films allegedly possessed by him, is infringing upon the appellant's First Amendment Constitutional rights to freedom of the press. This is necessarily so because appellant could not have had knowledge of the contents of such films until he had viewed them, and there was no evidence in this case that he had viewed them.

WHEREFORE, appellant prays this Court to grant a rehearing and reverse the judgment of the trial court.

(Signature and Address of Counsel and Certificate of Service Omitted in Printing.)

* * * *

ORDER DENYING MOTION FOR REHEARING

SUPREME COURT OF GEORGIA

Atlanta, April 22, 1968

The Honorable Supreme Court met pursuant to adjournment. The following order was passed: Robert Eli Stanley v. The State of Georgia. Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

* * * *

IN THE SUPREME COURT OF THE
STATE OF GEORGIA

(Title Omitted in Printing)

**NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES**

1. Notice is hereby given that ROBERT ELI STANLEY, appellant above named, hereby appeals to the Supreme Court of the United States from the final order and judgment of the Supreme Court of Georgia affirming the judgment of conviction entered herein on April 9, 1968 and denying a motion for rehearing thereon on April 22, 1968.

This appeal is taken pursuant to 28 U.S.C.A. No. 1257 (2).

Appellant was convicted of the crime of possessing obscene matter under the provisions of the Code of Georgia, Annotated, No. 26-6301, (Ga. Laws of 1963, p. 78,); was sentenced to one year imprisonment in the state penitentiary; and is presently enlarged on bail in the sum of $5,000.

2. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

Transcript of Record from Superior Court of Fulton County, omitting pages 4 through 19 thereof; Transcript of Evidence and Proceedings from Superior Court of Fulton County; Enumeration of Errors; Judgment and Opinion of this Court; Motion for Rehearing; and Order of this Court denying Motion for Rehearing; Order

Staying Remittitur; This Notice of Appeal, and 3 Reels of Film with Order authorizing them to be transmitted.

3. The following questions are presented by this appeal:

(a) Whether the Supreme Court of Georgia erred in holding and deciding that Georgia Code Section No. 26-6301, (Ga. Laws of 1963, p. 78,) under which the appellant was indicted, tried and convicted, is not repugnant to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing freedom of the press and due process of law in removing the element of scienter from the definition of the offense of possessing obscene matter, and by making the mere possession of such matter a crime.

(b) Whether the Supreme Court of Georgia erred in holding and deciding that a federal search warrant to search for bookmaking records and other wagering paraphernalia, founded on affidavits that the person sought to be searched has not registered as a gambler under the Wagering Tax Act, is a valid search warrant since the holding of the Supreme Court of the United States in the cases of Marchetti v. United States, No. 2, October Term, 1967, and Grosso v. United States, No. 12, October Term, 1967.

(c) Whether the Supreme Court of Georgia erred in holding and deciding that the search warrant and the search conducted thereunder were legal.

(d) Whether the Supreme Court of Georgia erred in holding and deciding that a state officer, acting in concert with special agents of the Intelligence Division of the U.S. Internal Revenue Service executing a federal search warrant issued for failure to register as a gambler

under the Wagering Tax Act, were authorized to seize motion picture films concealed in a desk drawer in the appellant's home on a claim by such state officer that such films were obscene matter, where no search warrant had been previously issued describing such films to be seized, or adjudicating that such films were obscene.

(e) Whether the Supreme Court of Georgia erred in holding and deciding that the evidence authorized the verdict when there was no evidence to show the appellant had knowledge that the films were obscene, or that he had ever viewed them, or that he had permitted juveniles to view them, or that he was publishing them in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or that he was "pandering" them.

(Signature and Address of Counsel and Certificate of Service Omitted in Printing.)

* * * *

SUPREME COURT OF THE UNITED STATES

(Title Omitted in Printing)

CROSS-DESIGNATION OF RECORD BY APPELLEE FOR INCLUSION IN APPENDIX

Now comes the Appellee, within the period provided by Rule 36 (2) of this Court, and cross-designates the parts of the record which he intends to include in the Appendix as necessary for the presentation of his case:

Cross-Designation No. 1

The testimony of George A. Carter on the hearing on the Motion to Suppress Evidence. (R 89 to 96) (R 109-111 omitting colloquy between counsel and the court.)

Cross-Designation No. 2

The testimony of William A. Pair on direct examination (R 142-149) and re-direct examination (R 153-154).

Cross-Designation No. 3

The testimony of Darrell G. Smith on direct examination (R 155-159 omitting objection of counsel on R 156).

Cross-Designation No. 4

The testimony of George A. Carter on direct examination and re-direct examination (R 168-175, R 185-186 omitting the objection of Defense Counsel and Ruling by the Court on R 173 and R 174).

Cross-Designation No. 5

The testimony of Howard Farr on direct examination. (R 187-189)

Cross-Designation No. 6

The admission of the three rolls of film, State's Exhibits 1, 2, and 3 without objection.

Cross-Designation No. 7

The testimony of James P. Wesberry on direct examination. (R 193-197, omitting the objection of defense counsel, colloquy between counsel, and ruling upon the objection by the court on R 196-197).

Cross-Designation No. 8

The following colloquy between the Court and the Defense Attorney noting the defense position that the film in issue is not obscene.

Cross-Designation No. 9

The testimony of Thomas Price on Direct Examination. (R 218-219)

Cross-Designation No. 10

The testimony of Hinson McAuliffee on direct examination. (R 225-226)

Cross-Designation No. 11

The testimony of Howard M. Hargis on direct examination. (R 233-235)

Cross-Designation No. 12

The testimony of C. Clayton Powell on direct examination. (R 240-241)

Cross-Designation No. 13

The testimony of J. R. Wilson on direct examination. (R 249-250)

Cross-Designation No. 14

The testimony of Charles Stewart on direct examination. (R 257-258)

Cross-Designation No. 15

The entire unsworn statement of the Defendant. (R 263)

Cross-Designation No. 16

The portion of the Court's charge to the jury referring to the indictment showing that knowledge is an essential element of the crime.

Cross-Designation No. 17

The portion of the Court's charge upon circumstantial evidence.

Cross-Designation No. 18

The portion of the Court's charge on the Georgia Obscenity Statute, on the test of obscenity, and on the Jury's being the exclusive Judge of the common conscience of the community.

Cross-Designation No. 19

The portion of the Court's charge to the Jury providing that the defendant must knowingly have possession of Obscene Matter.

Cross-Designation No. 20

The Search Warrants and Supporting Affidavits set forth as additional Record. (R 37-57)

Respectfully submitted,

(Certificate of Service and Signatures of Counsel Omitted in Printing.)

* * * *

TESTIMONY OF WILLIAM A. PAIR, (R. 142)

DIRECT EXAMINATION

BY MR. SPARKS:

Q What is your name, please?

A William A. Pair.

Q What is your occupation?

A Special agent for the Intelligence Division of the Internal Revenue Service.

Q How long have you been with the Internal Revenue Service?

A Since 1946.

Q Are you stationed here in Atlanta?

A Yes, sir.

Q Mr. Pair, I will ask you whether or not you know Robert Eli Stanley?

A Yes, I do.

Q If you see him in the courtroom, point him out, please.

A The gentleman in the blue suit sitting beside Mr. Asinof at the defense table.

(R. 143)

Q I will ask you whether or not you had an occasion in company with other federal officers with Mr. George A. Carter, an investigator of the Solicitor's Office of the Criminal Court of Fulton County to conduct a search pursuant to a search warrant, a federal search warrant, at 280 Springside Drive, S.E., Atlanta, Georgia, on the 7th day of September, 1966?

A Yes, sir, I did.

Q Whose residence was that?

A The residence of Robert Eli Stanley.

Q Mr. Pair, tell us what time you arrived at the house, what you saw initially, and just recount the facts.

A At 6:00 p.m. on September 7, 1966, Special Agent Darrell Smith, Investigator George Carter and myself arrived at the premises and drove to the back of the house, where there is a concrete apron for parking cars. When we arrived there, there were several, I think three, cars parked behind the house at that time. One of these cars was an old black Ford, and Joe Dean Stanley and someone named Wallace was standing beside the car.

Q Joe Dean Wallace and whom?

A A gentleman named Wallace, gave his name as Wallace. I saw Bob Stanley through a window, he was inside the house. (R. 144) George Carter was the first man out of the car, followed by Darrell Smith, and then myself. I was driving the car. There are two back doors to the house, which is a two-story house. George Carter went toward one of the back doors and I saw Bob Stanley go through the house, saw him meet him at that back door.

Darrell Smith and myself went to the other back door and entered the house. Mr. Carter who had been encountered by Mr. Stanley came on into the middle room of the downstairs portion, and at that point I identified myself to Mr. Stanley, told him we had a federal search warrant for the premises and exhibited it to him and advised him that his constitutional rights included the right for an attorney before he was questioned. At that point I went upstairs with Special Agent Darrell Smith and Howard Farr who had joined us in the meantime in another car, came in several minutes after we did, and George Carter and I looked the upstairs over and left them upstairs searching the upstairs and went downstairs and conducted a downstairs search of the house.

Q Would you briefly describe the layout of the house, not in any great detail?

A The house is a two-story house, it has three rooms in the downstairs, the first room being a living room, and then the middle room being a kitchen, dining room with a bar in it. **(R. 145)** It is a large family type thing, and then adjacent to that is a game room, pool table and some antiques, sewing machine and various antique objects in there. Upstairs is three rooms also. When you enter the upstairs, you walk into a sitting type room, and then on each side of that a bedroom, one large bedroom and one bedroom quite a bit smaller, and the bath being upstairs in the house also.

Q What was done and what did Joe Dean Stanley and the Wallace man who were outside in the yard do or where did they remain?

A Within a couple of minutes of our entering the house Joe Dean Stanley and Mr. Wallace also entered

the house. And at that time I told them if they would sit down with Mr. Stanley in the family room, it's a kitchen dinette type thing there, and remain until we could search the premises and we would deal with them later after we got through searching. They did this.

Q Now when Mr. George Carter and Mr. Darrell Smith, Special Agent Darrell Smith were upstairs searching, did Mr. Robert Eli Stanley go upstairs at all?

A Not during the search, no, sir. He remained downstairs during the searching of the premises, and after the (R. 146) search of the premises was over, Mr. Carter in my presence placed Mr. Stanley under arrest and searched his person.

Q Do you recall the words that Mr. Carter used to Mr. Stanley when he placed him under arrest?

A To the best of my recollection, he said I'm going to have to arrest you for these reels of pornographic films upstairs.

Q For the reels of pornographic film upstairs?

A Yes, sir.

Q What if anything did Mr. Stanley reply to that?

A He made no statement in my presence, Mr. Sparks.

Q He made no statement?

A No, sir.

Q What if anything did you observe about the dining room table?

A The dining room table was set up for dinner, that is plates, knives and forks were set up for place settings,

looked like about eight persons, set up for about eight persons.

Q Now how long have you known Mr. Robert Eli Stanley, the defendant?

A I have known him by sight for approximately 10 to 12 years, Mr. Sparks.

(R. 147)

Q To the best of your knowledge, sir, can you state whether or not Mr. Robert Eli Stanley was a married man or a single man on the 7th of September, 1966?

A To the best of my knowledge, he is a single man.

Q Single?

A Yes, sir.

Q How long did the search continue, I believe you said it started about 6:00.

A I believe the search lasted about three hours there, Mr. Sparks, until about 9:00 at night, something like that.

Q During the time that you officers, State and Federal officers were in the building, state whether or not anyone came to the house or attempted to enter the house.

A Yes, sir, there were several visitors to the house during that time. The first one being a lady, who identified herself as D. Stanley, who lived one door down, second door down from Mr. Stanley. Then I believe the second visitor came, who attempted to enter the house was a gentleman named J. R. Kennedy.

Q J. R. Kennedy?

A Yes, sir.

Q Go ahead, continue.

A Then following that two young ladies came to the back door and attempted to enter the house, and all of these (R. 148) persons were sent on their way. We did not allow them to enter.

Q You did not allow them to enter?

A No, sir.

Q Can you tell us in a general way, sir, how old was the lady, Mrs. D. Stanley, and the other two ladies that attempted to enter the house or who came to the house, how were they dressed — I mean roughly — Were they dressed up or wearing slacks or casual clothes or what?

A To the best of my memory, they impressed me as being well dressed people.

Q Did you see any food in the house in the course of being prepared or ready for preparation?

A Yes, sir, on one of the tables I believe adjacent to the stove or counter adjacent to the stove there was a large pan of prepared biscuits which was covered over by a cloth.

Q Were there many biscuits or a few?

A Quite a few, I would say maybe three dozen.

Q About three dozen?

A Yes, sir.

Q Now Mr. Pair, to your knowledge is this house at 280 Springside Drive, S.E., was that house in Fulton

County (R. 149) Georgia, on the date that you made the search on September 7, 1966?

A Yes, sir, that is correct.

Q Mr. Pair, anytime during the evening did you have an occasion to go upstairs and look at portions of the film that was being run up there?

A Yes, sir, during the course of my search downstairs Mr. Carter came down and talked with me and as a result of that conversation I went upstairs and I found that Mr. Darrell Smith and Howard Farr, Mr. Carter had set up a screen and projector and were viewing some film. I looked at a portion of one reel of this film.

Q Did you or not personally find any reels of film in the house?

A No, sir, I didn't.

* * * *

(R. 153)

REDIRECT EXAMINATION

BY MR. SPARKS:

Q When you went there at 6:00 o'clock, entered the house of Mr. Stanley, was it daylight?

A Yes, sir, it was.

Q Did these girls come more than once, to your knowledge?

(R. 154)

A The lady who identified herself as D. Stanley, came toward the first of our search, and I sent her away, and then toward the end of the search she came back. At this time the search was approximately finished and

I did allow her in the house at that time. The other girls were there only once.

Q Mr. Pair, were you or not present when Mr. Stanley went upstairs, if he did; to get him a coat?

A When he was placed under arrest by Mr. Carter, we told him that we would have to take him down to the Fulton County jail and he asked permission to get his coat, and Mr. Carter and I both went upstairs with him. He went to what we call the master bedroom, being the biggest bedroom, the king size bedroom was, got a coat out of the closet there.

Q Did he wear that coat to the police station?

A Yes. That was the larger of the two bedrooms, is that correct? . . .

A That is correct.

* * * *

TESTIMONY OF DARRELL G. SMITH,

(R. 155)

DIRECT EXAMINATION

BY MR. SPARKS:

Q What is your name, please?

A Darrell G. Smith.

Q What is your occupation, Mr. Smith?

A I'm a special agent with the Intelligence Division of the Internal Revenue Service.

Q Is that the United States Treasury Department?

A Yes, sir, that's right, U.S. Government.

Q Mr. Smith, I don't want to be repetitious of the testimony of Mr. Pair, but I will ask you whether or not you accompanied Mr. Pair and Mr. George Carter to the premises known as 280 Springside Drive, S.E. on September 7, 1966?

A Yes, I did.

Q Did you or not participate in the search of the building?

A Yes, sir, I did.

Q Is that a residence?

A Yes, sir.

Q Did you search the bedroom upstairs which has been previously referred to as the master bedroom or the (R. 156) larger bedroom?

A Yes, sir.

Q I will ask you whether or not you found any reels of motion picture film in that bedroom?

A Yes, sir, in the desk in that bedroom I found three rolls of film in one drawer of that desk.

Q In the drawer of the desk?

A Yes, sir.

Q When you first started searching the desk, Mr. Smith, were the drawers opened or closed?

A They were closed.

Q I show you State's Exhibits No. 1, 2 and 3 and I will ask you whether or not you have seen those before?

A Yes, sir, these two have labels on them are the same two rolls that I got out of the desk. This one is without a label, I guess it's the third roll.

* * * *

Q You say the first two with the labels now are the ones you got out of the desk, is that correct?

A Yes, sir, that's right.

(R. 157)

Q And the third one which you got out of the desk being in that search, did that or not have a label on it?

A No, it did not have a label on it at the time.

Q What did you subsequently do with the third one, with all three, the two labeled ones and the third one, who did you turn them over to?

A George Carter.

Q Is that Mr. George Carter sitting at the defense table right there?

A Yes, sir.

Q Mr. Smith, after you found these exhibits, Nos. 1 and 2, and the unmarked reel, in addition to that as you have testified, what if anything did you and Mr. Carter and the other officers do with reference to the films?

A There was a projector in the middle room upstairs, what has been referred to as a sitting room, and Special Agent Farr set up a projector and reloaded one of the rolls with the label on it, and then we looked at it, just a portion of the other two rolls, and found them to be the same type of film as the first roll there.

Q Will you just tell us in general terms what each of the three films showed, three rolls of film?

(R. 158)

A Well, men and women, naked men and women having sexual relations, acts of perversion, such as that.

BY THE COURT: Explain to the jury what you mean by perversion.

A Well, acts of sodomy, man and woman, either one or the other.

Q Committing acts of sodomy upon each other?

A That's right.

Q When you were searching that master bedroom or larger bedroom upstairs, I'll ask you what if anything you observed in that bedroom which indicated or might indicate the identity of the person who occupied the bedroom.

A Well, in searching the desk there were various letters addressed to either Robert Eli or Robert E. Stanley or Bob Stanley. There were stock brokerage forms with his name on it, and some other various pieces of paper that had his name on it.

Q Did you look into the closet in the master bedroom?

A Yes, sir.

Q What did you observe in there?

A It was an entire wall closet, it had numerous numbers of suits in it, some of them had laundry marks still (R. 159) on the suits with his name on them.

Q Did they have Robert Eli Stanley's name on them?

A Yes, sir.

Q Do you see Robert Eli Stanley in the courtroom today?

A Yes, sir, I do.

Q Point him out, please, sir.

A The gentleman beside Mr. Asinof.

Q Mr. Smith, to your knowledge during the time that the search was being made of the residence of Mr. Robert Eli Stanley, did he contact his lawyer?

A I understand he did, I was not there.

Q You were not there?

A I was not there when he contacted him, no, sir.

* * * *

TESTIMONY OF GEORGE A. CARTER,

(R. 168)

DIRECT EXAMINATION

BY MR. SPARKS:

Q State your name and occupation, please.

A George A. Carter, I am an investigator for the Criminal Court of Fulton County.

Q You work out of the office of Solicitor William Spence?

A Yes, sir.

Q Mr. Carter, I'll ask you whether or not you had an occasion to participate in the search of a residence occupied by Mr. Robert E. Stanley located at 280 Spring-

side Drive, S.E., Atlanta, Georgia, on September 7, 1966?

A Yes, sir, I did.

Q Without being repetitious of the testimony given by the other officers, I will direct your attention to the search of the upper, the upstairs of the larger or master bedroom as it has been referred to. Did you help search that room?

A Yes, sir.

(R. 169)

Q Were you or not present in the master bedroom when Mr. Smith found the three rolls of film which he has previously testified about?

A Yes, sir, I was.

Q I'll show you State's Exhibits Nos. 1, 2, and 3 and ask you what Mr. Smith did with those — What did you and Mr. Smith do with them after Mr. Smith found them?

A Mr. Smith called my attention to the fact that he found those reels of movie film that were just like this, not in cans, and Mr. Pharr set up a camera that was in the so called upstairs sitting room and he ran off one entire reel.

Q Who is Mr. Farr?

A He is a Special Agent with the Intelligence Department, and he run off a portion of the others.

Q Did you observe the running of the three films or portions of the three films?

A Yes, one was run entirely and the others were just a portion of them.

Q What action did you take then after you had discovered the contents of them, whom did you talk with — Don't go into the conversation, but whom did you talk with?

A I first called the Solicitor, William E. Spence, that I worked for, and then I called Mr. Slaton, the Superior (R. 170) Court Solicitor.

Q That is Mr. Lewis R. Slaton, Solicitor General of Atlanta Judicial Circuit?

A Yes, sir.

Q As a result of those conversations, did you take any action relative to Mr. Robert Eli Stanley?

A Yes, sir, I took possession of the film and then I went down and talked to Mr. Stanley, called him out of the living room into the kitchen and dining area and I advised him that I was placing him under arrest for possession of obscene film.

Q Did he reply or not?

A No, sir, he made no comment.

Q He made no comment at all?

A No, sir.

Q Relative to State's Exhibits No. 1, 2, and 3, particularly with reference to State's Exhibit No. 3, which does not have a label on it, I will ask you whether or not State's Exhibit No. 3 is one of the three films which Mr. Darrell Smith found in the master bedroom while you were there?

A Yes, sir, those are the three films that I took (R. 171) possession of.

Q Does the same thing apply to State's Exhibits 1 and 2, are they the same ones that Mr. Smith found in which you all ran and then took possession of?

A Yes, sir, they are.

Q Mr. Carter, I direct your attention to Friday afternoon, September 16th, 1966, and ask you whether or not you had an occasion to do anything with reference to these three film?

A Yes, sir, we had a showing of the film in the Grand Jury room.

Q Were other persons present?

A Yes, sir, Mr. Slaton and other men were present, some I knew and some I did not.

Q Was I present?

A Yes, sir.

Q I show you State's Exhibit No. 4, did the persons who viewed the showing of these three film, did they sign their names on a piece of paper after having seen it?

A Yes, sir.

Q Is this the list?

A Yes, sir.

Q Mr. Carter, on that date was State's Exhibits No. 1, 2, and 3 shown completely to the assembled group, (R. 172) were all of the films shown?

A Yes, sir.

Q Completely run through?

A Yes, sir.

Q Is your name signed on this list as well?

A Yes, sir, my name is on it, dated underneath.

Q Mr. Carter, during the time that you were in the house, Mr. Stanley's house, during the course of the search, did you or not have an occasion to talk with his lawyer, did he have an occasion to talk with his lawyer and did you all have an occasion to talk to his lawyer?

A Yes, sir.

Q Which lawyer did you talk to?

A Mr. Asinof.

Q Mr. Wesley Asinof, sitting at the table over there?

A Yes, sir.

Q Mr. Carter, were the premises which were occupied by Robert Eli Stanley on September 7, 1966, located at 280 Springside Drive, S.E., was that or not in Fulton County?

A Yes, sir, it is.

Q When you viewed the films as shown upon that wall **(R. 173)** out there at the house or portions of the three film, I'll ask you whether or not considering in applying contemporary community standards that exist in Fulton County, whether in your opinion those films, the three films, whether or not their predominant appeal is to a shameful and morbid interest in nudity and sex—

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* * * *

Q I will ask you this, this preliminary question, Mr. Carter. How old are you?

A 55.

Q And are you familiar with the contemporary community standards in the community where you live and people with whom you associate as to material which is decent and that which is obscene?

A Yes.

Q All right, based on that knowledge, then I'll ask you whether or not in your opinion the predominant appeal of this film was to a shameful and morbid interest in nudity and sex?

(R. 174)

A Yes, sir.

Q From your viewing of the three films, Mr. Carter, and still applying contemporary community standards which you stated that you are familiar as to what is decent and what is obscene, I'll ask you whether or not in your opinion there is any redeeming social value in those three films.

(R. 175)

A In my opinion, no.

* * * *

REDIRECT EXAMINATION

(R. 185)

BY MR. SPARKS:

Q Mr. Carter, when you testified to your opinion as to the obscene nature of these films that you seized, I'll ask you whether or not you were basing that on the contents of the film which you had seen which you have told Mr. Asinof about, the acts of sexual intercourse and sodomy—Perhaps I made my question too long. Was it your opinion as to the nature of these films, was it or was

it not based on the actual contents of the films as you viewed them showing actual sodomy and sexual intercourse?

A Yes, sir, in my opinion it was on these three films.

BY THE COURT: Where was the large bedroom or the master bedroom wherein the three films, State's Exhibits No. 1, 2, and 3 were found, where was that located with reference to the upstairs sitting room where the movie projector was **(R. 186)** found and the screen and the other films which you have seized?

A The upstairs bedroom, the master bedroom, if you go upstairs it would be to the right of this little sitting room, and these films were found in that room in a desk drawer by Mr. Darrell Smith. Now the other film were found in the little sitting room upstairs, I believe it was a dresser in there and they were in there.

* * * *

TESTIMONY OF C. HOWARD FARR,

(R. 187)

DIRECT EXAMINATION

BY MR. SPARKS:

Q State your name and occupation to the jury.

A C. Howard Farr, Special Agent, Internal Revenue Service, Intelligence Division.

Q United States Government?

A That's right.

Q Mr. Farr, did you accompany Mr. George Carter

and Mr. Darrell Smith, Mr. William Pair on the execution of a search warrant involved in this case at 280 Springside Drive, S. E. on September 7, 1966?

A I arrived about two minutes after they did in another car.

Q You came about two minutes behind them?

A That's right.

Q In another automobile?

A Yes.

Q Without repeating unnecessarily the testimony of all of the witnesses, I will direct your attention to three **(R. 188)** reels of movie film, State's Exhibit Nos. 1, 2 and 3, and I will ask you did you or did you not set up a projector in the upstairs sitting room and display or run these films through the movie projector?

A Yes, I did.

Q Mr. Farr, I'll ask you have you ever had any experience as a photographer or dealing with pictures and still pictures and motion pictures in the past?

A Yes, sir, I've had about five years experience as a professional photographer primarily in still and commercial and portrait work but including some movie work, taking and developing movies.

Q I'll ask you then what was the condition of these film, State's Exhibits No. 1, 2 and 3 at the time you set up the movie projector on the second floor of Mr. Stanley's house on September 7, 1966 and ran them?

A They are badly scratched, dirty. They are not in new condition at all. One roll was wound backward—

In other words, it appeared it was never rewound after a showing of the film.

Q Did you have to rewind it in order to run it?

A No, sir, I just ran a few feet of it, it was (R. 189) upside down on the screen as it was projected.

Q Based on those facts, sir, and on your prior experience as a professional photographer for five years, I'll ask you whether or not in your opinion those film had been shown before by someone?

A Yes, sir, they obviously had been shown before.

* * * *

ADMISSION INTO EVIDENCE OF 3 ROLLS OF FILM

(R. 191)

"By Mr. Sparks: If it please the Court, I now tender in evidence State's Exhibits Nos. 1, 2, and 3.

By Mr. Asinof: No objection.

By the Court: Let them be admitted."

TESTIMONY OF DR. JAMES P. WESBERRY,

(R. 193)

DIRECT EXAMINATION

BY MR. SPARKS:

Q Will you state your name and occupation or profession I should say, to the jury?

A My name is James P. Wesberry, I am pastor of the Morningside Baptist Church and have been for 23 years almost. I am also Chairman of the Georgia State Literature Commission.

Q How long have you been in charge of the Georgia State Literature Commission?

A We were appointed in 1953.

Q In 1953?

A Yes.

Q Have you been Chairman ever since?

A Yes.

Q And still are Chairman?

A Yes.

Q Dr. Wesberry, where is your church located?

A Our church is out here on Piedmont Road, Piedmont Avenue here in Atlanta.

Q Is that in Fulton County?

(R. 194)

A Yes, sir.

Q Are members of your congregation drawn in a large part from Fulton County?

A I would say the majority live in Fulton, yes.

Q Dr. Wesberry, during the approximate 13 years that you have been on the State Literature Commission and Chairman of the State Literature Commission, I will ask you whether or not you have had an occasion on a great many occasions to examine and look at matter alleged to be obscene, books, pictures, magazines, photographs and so forth?

A We have had, it's been our duty to look at a great many of them.

Q What is the State Literature Commission, what is the function, just very briefly.

A The State Literature Commission is a group of three men who are appointed by the Governor, confirmed by the State Senate, for the purpose of studying matters of pornography. We hold hearings, make findings, cooperate with the Solicitors General over the State of Georgia.

Q I will ask you whether or not as pastor of your church, you are familiar with the contemporary community standards among the members of your church, members of your **(R. 195)** congregation as related to decency?

A I think I am, yes.

Q Doctor, I will ask you whether or not on the 16th day of September, 1966, on a Friday about 4:00 in the afternoon did you have an occasion to go up to the Solicitor General's office in the Grand Jury room and look at three films?

A Yes.

Q I show you State's Exhibit No. 4 and ask you to look at that and see if your name appears on this list?

A My name is the third one from the top, yes.

Q The third one from the top?

A Yes.

Q Now those films which you viewed, I will ask you in the light of your experience as a pastor and your knowledge of the contemporary community standards, that you are aware of among the members of your con-

gregation as related to decency and in view of your experience of 13 years as State Literature Commission Chairman, I will ask you whether or not those films which you saw then, whether their predominate appeal is to a shameful and morbid interest in nudity and sex?

(R. 196)

A Extremely so.

Q Doctor, did you find anything of social value in those three films that you looked at in the Solicitor General's office on that day?

A There is no redeeming social importance whatsoever.

* * * *

(R. 197)

A It is the most obscene film or pictures I have seen in my life, the most obnoxious, nauseating, sickening and foul and disgusting, it reaches as far as I am concerned in the entire 13 years, the lowest level that I can imagine. I don't think I could imagine anything worse, I don't think.

* * * *

CONTENTION OF DEFENSE THAT FILMS NOT OBSCENE

(R. 208)

"By the Court: — do you take the position that these film which have been displayed here today before the court and jury are not obscene?

By Mr. Asinof: Yes, Sir.

By the Court: You take that position?

By Mr. Asinof: Yes, sir, under the First Amendment."

* * * *

TESTIMONY OF THOMAS PRICE,

(R. 218)

DIRECT EXAMINATION

BY MR. SPARKS:

Q State your name and occupation.

A Thomas E. Price, service station operator.

Q What?

A Service Station operator.

Q Where is your service station located?

A 1551 Piedmont Avenue.

Q Is that in Fulton County, Georgia?

A Yes, sir, it is.

Q Where is your home?

A 5926 Greenbriar Road, N.E.

Q Is that in Fulton County?

A Yes, sir.

Q Mr. Price, I'll ask you whether or not you are familiar with the contemporary standards, temporary community standards of your community in which you live with reference to morality and decency?

A I think so.

(R. 219)

Q Sir, were you present in the Grand Jury room in the Solicitor General's office in the courthouse here in this building on September 16, 1966?

A Yes, sir.

Q Did you see three films shown at that time, sir?

A Yes, sir.

Q Did you happen to be in the courtroom when these three films were shown again today?

A No, sir.

Q You were not here then?

A No, sir.

Q I will ask you whether comparing, applying contemporary community standards that exist in your community in Fulton County, Georgia, whether or not those three films that you saw back in September their predominant appeal was to a shameful and morbid interest in nudity and sex?

A They certainly was.

Q What type service station do you operate?

A Gulf.

* * * *

TESTIMONY OF HINSON McAULIFFE,

(R. 225)

DIRECT EXAMINATION

BY MR. SPARKS:

Q State your name and profession to the court and jury.

A My name is Hinson McAuliffe, Assistant Solicitor General in the Criminal Court of Fulton County.

Q Of course, you are an attorney?

A Yes, sir.

Q Where do you live?

A I live at 1871 Plaza Lane, S.W.

Q Is that in Fulton County, Georgia?

A Yes, sir.

Q What part of the county is this geographically?

A Well, it's in the southwestern portion of the City of Atlanta.

Q Southwestern portion?

A Yes, sir, generally off of Campbellton Road.

Q I'll ask you whether or not you are familiar with the contemporary community standard in the community in which (R. 226) you live in Fulton County, Georgia, with reference to morality and decency?

A Yes.

Q Were you in the courtroom today when the three films were shown?

A Yes.

Q Were you also present in the Solicitor General's office up on the third floor back on September 16, when the same three films were shown?

A Yes, sir.

Q I'll ask you whether or not considering those three motion picture films as a whole in applying contemporary community standards that exist in your community in Fulton County, Georgia, whether or not the predominant appeal of those film is to a shameful and morbid interest in nudity and sex?

A Yes, sir, I would say it would be because I would consider it against the standards and morals of about 99 percent of the people of this county.

* * * *

TESTIMONY OF HOWARD M. HARGIS,

(R. 233)

DIRECT EXAMINATION

BY MR. SPARKS:

Q Would you state your name and place of residence.

A This is Howard M. Hargis, I live in Fairburn, Georgia.

Q Is that in Fulton County?

A That is in Fulton County, yes, sir.

Q The south end, is that right?

A It is old Campbell County, yes.

Q Part of what is known as old Campbell County?

A Yes, sir.

Q What is your occupation, Mr. Hargis?

A I am retired.

Q What did you do prior to your retirement?

A I retired from Southern Railroad as locomotive engineer.

Q Mr. Hargis, I'll ask you whether or not you are familiar — Strike that question — How long have you lived in Fairburn or around Fairburn?

A I moved to Fairburn in 1962.

(R. 234)

Q In 1962?

A Yes.

Q You've lived there ever since in the same house?

A Yes, in the same house.

Q Now I will ask you whether or not based on that long time of living in the same house in Fairburn, Georgia, whether or not you are familiar with the contemporary community standards that exist in that section of Fulton County with reference to morality and decency?

A I think I am.

Q Mr. Hargis, were you one of those who attended the showing of these three films in the Grand Jury room on the 4th floor of this courthouse on September 16, 1966?

A I was.

Q Did you see the films again when shown in the courtroom today?

A No, I left when they said they were going to show them again; I left the courtroom.

Q I will ask you, taking those three motion picture films that you saw back in September of 1966, and considering them as a whole and applying the contemporary community (R. 235) standards which you say you are familiar with in Fairburn, Georgia, Fulton County, Georgia, I'll ask you whether or not the predominant appeal of those three films that you saw is to a shameful and morbid interest in nudity and sex, in your opinion?

A I consider them very nauseating, they were not fit to be shown and would not be shown in any place in Fairburn that I know of, where the majority of the God fearing and church going folks that I am acquainted with would put up with it at all.

Q Do you belong to any social or civic organizations or fraternal organizations?

A I'm past master of my lodge at Fairburn and I have gone through the Scottish Rite, into the Shrine.

* * * * *

TESTIMONY OF C. CLAYTON POWELL,

(R.240)

who being first duly sworn, testified in behalf of the State as follows:

DIRECT EXAMINATION

BY MR. SPARKS:

Q State your name and occupation, please.

A I am C. Clayton Powell, optometrist.

Q Where do you live, Mr. Powell?

A 403 Fielding Lane, S.W.

Q Is that in Fulton County?

A Yes, it is.

Q And where is your optometrist office?

A 864 1/2 Hunter Street, S.W.

Q How long have you been a resident of Fulton County?

A Since 1942.

Q Since 1942?

A Yes.

Q I'll ask you whether or not you are familiar with the contemporary community standards that exist in this county, particularly in that part of the county where you reside and practice relative to decency and morality?

(R. 241)

A Yes, I am.

Q Did you or not view these films in the Solicitor General's office in the Grand Jury room on the 3rd floor of the courthouse on September 16, 1966?

A Yes, I did.

Q Mr. Powell, applying the contemporary community standards with which you have stated that you are familiar, to said motion picture films and consider it as a whole, I will ask you whether or not the predominant appeal of those films is to a shameful and morbid interest in nudity and sex?

A I definitely think so.

Q You think so?

A Yes.

* * * *

TESTIMONY OF J. R. WILSON,

(R. 249)

DIRECT EXAMINATION

BY MR. SPARKS:

Q What is your name, please?

A J. R. Wilson, Jr.

Q What is your occupation?

A I am in the real estate business.

Q Where do you live?

A 1487 Mozley Drive, S.W.

Q Is that in Fulton County?

A Fulton County.

Q Where is your place of business?

A 905 Hunter Street, N.W.

Q Is this in Fulton County?

A Yes, sir.

Q How long have you been in the real estate business in Fulton County?

A Been in business about 33 years, been here about 55.

Q About 55?

A Yes, sir.

Q I will ask you whether or not you are familiar (R. 250) with the contemporary community standards that exist in your community and in Fulton County, Georgia, with reference to decency and morality?

A I think so.

Q Mr. Wilson, did you or not attend a showing of three films in the Solicitor General's office on the 4th floor of this courthouse back in September, September 16, 1966?

A I did.

Q Were you also present in court when those three films were shown today?

A Yes, sir.

Q I will ask you when considering those three films as a whole and applying contemporary community standards which you have stated that you are familiar with, I will ask you whether or not the predominant appeal of those films is to a shameful and morbid interest in nudity and sex, in your opinion?

A Yes, I certainly would say it would be. I am the father of three children, three girls and one boy, 23. I certainly would not want them to see any kind of this material. It certainly is objectionable.

* * * *

TESTIMONY OF CHARLES STEWART,

(R. 257)

DIRECT EXAMINATION

BY MR. SPARKS:

Q What is your name, please, sir, and your profession?

A Charles Stewart, I am an attorney, assistant Solicitor General to Lewis Slaton, in Fulton County.

Q You work in the same office as I do for the same boss, is that right, Mr. Stewart?

A Yes.

Q Where do you live, Mr. Stewart?

A 1541 Orlando Street, S.W.

Q Is that in Fulton County?

A Yes.

Q How long — Where is your office?

A On the 3rd floor of the courthouse.

Q How long have you occupied that office or had your office in the Solicitor General's office here in Fulton County, in the courthouse?

A 37 years.

Q 37 years?

(R. 258)

A Yes.

Q I will ask you whether or not you are familiar with the contemporary community standards that exist in Fulton County and in your neighborhood, your area of Fulton County, particularly with reference to decency and morality?

A Yes, I am.

Q Mr. Stewart, were you present when a select group of people viewed film in our office on the 3rd floor of the courthouse on September 16, 1966?

A I was.

Q Did you see the three films shown at that time?

A Yes.

Q Mr. Stewart, I will ask you this question, when considering those three motion picture films as a whole applying the contemporary community standards that exist in Fulton County, which you testified that you are familiar with, I'll ask you whether or not those films, the predominant appeal of those films is to a shameful and morbid interest in nudity and sex?

A It is.

* * * *

DEFENDANT'S STATEMENT

(R. 263)

I am a bachelor. I live by myself. I have a girlfriend. We planned a party for Labor Day. I invited several couples out. Later on in the evening, a friend of mine came by and said, I brought you something I want you to see. He handed it to me. It was three rolls of film. I took the film upstairs and put it in the desk drawer, closed the desk drawer and came back downstairs. And the next day I went to town, came into town, spent the night in town, and had been home only a few minutes when the officers came out. And I had completely forgotten about the film until that time that they informed me they were arresting me for it.

I never saw the film before today. I never had shown them to anyone, so help me.

* * * *

CHARGE OF THE COURT REFERRING TO INDICTMENT

(R. 266)

Gentlemen of the Jury, you are now trying the case of THE STATE against ROBERT ELI STANLEY, who is charged with a felony (possession of obscene matter).

The Grand Jurors selected, chosen and sworn for the County of Fulton, who are named in this bill of indictment, in the name and behalf of the citizens of Georgia, charge and accuse ROBERT ELI STANLEY with the offense of felony (possession of obscene matter) for that said accused, in the County of Fulton and State of Georgia, on the 7th day of September, 1966, did knowingly have possession of obscene matter, to wit: one reel of motion picture film entitled "Young Blood," showing a nude man exhibiting his male organ and a nude woman exhibiting her female organ, the nude man and nude woman being engaged in acts of perversion and sodomy, the nude man having his mouth and tongue upon, against and into the female organ of said nude woman, the nude woman taking and having the male (R. 267) organ of the nude man in her mouth, said motion picture film also showing a nude man and a nude woman engaged in an act of sexual intercourse; one reel of motion picture film showing a nude man and a nude woman exhibiting their private parts, said film also showing a nude man and a nude woman engaged in an act of sexual intercourse, said nude man and nude woman engaged in an act of sodomy

the woman having and taking the male organ of said man into her mouth, said reel of motion picture film being a different film from others alleged in this indictment; one reel of motion picture film showing a nude woman and a nude man exhibiting their private parts engaged in an act of sexual intercourse, and in an act of perversion the woman taking and having the male organ of said man in her mouth, said reel of motion picture film being a different film from other alleged in this indictment; said accused having knowledge of the obscene nature of such motion picture film and matter; said motion picture films when considered as a whole and applying contemporary community standards that exist in this county, being obscene matter whose predominant appeal is to a shameful and morbid interest in nudity and sex; and accused should reasonably have known of the obscene nature of said matter; said act of accused being contrary to the laws of said State, the good order, (R. 268) peace and dignity thereof.

* * * *

THE COURT'S CHARGE UPON CIRCUMSTANTIAL EVIDENCE (R. 269)

"Now, gentlemen of the jury, evidence is of two kinds. I charge you that direct evidence is that which immediately points to the question at issue. Circumstantial evidence is that which only tends to establish the issue by proof of (R. 270) various facts sustaining, by their consistency, the hypothesis claimed. To warrant a conviction upon circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused."

* * * *

THE COURT'S CHARGE ON THE TEST OF OBSCENITY

(R. 271)

"Now, the law of this State provides that any person who shall knowingly have possession of, any obscene matter, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years: Provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion.

I charge you that the test of obscenity is not whether the alleged obscenity would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated, indifferent and unmoved.

(R. 272)

The test in each case is the effect of the films considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The films must be judged as a whole, in their entire context, and you are not to consider detached or separate pictures in reaching a conclusion. You judge the films which have been put in evidence by present-day

standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.

In this case you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious — men, women and children."

* * * *

THE COURT'S CHARGE TO THE JURY ON KNOWLEDGE

(R. 272)

"Now, gentlemen, I charge you that if you believe beyond a reasonable doubt that this defendant did, in the County of Fulton, State of Georgia, at any time within four years next preceding the date that this bill of indictment was returned by the Grand Jury into this Court, did knowingly have possession of obscene matter, to wit: one reel of motion **(R. 273)** picture film entitled "Young Blood", showing a nude man exhibiting his male organ and a nude woman exhibiting her female organ, the nude man and nude woman being engaged in acts of perversion and sodomy, the nude man having his mouth and tongue upon, against and into the female organ of said nude woman, the nude woman taking and having the male organ of the nude man in her mouth, said motion picture film also showing a nude man and a nude woman engaged in an act of sexual intercourse; one reel of motion picture film showing a nude man and nude woman exhibiting their private parts, said film also showing a nude man and a nude woman engaged in an act of

sexual intercourse, said nude man and nude woman engaged in an act of sodomy the woman having and taking the male organ of said man into her mouth, said reel of motion picture film being a different film from others alleged in the indictment; one reel of motion picture film showing a nude woman and a nude man exhibiting their private parts engaged in an act of sexual intercourse, and in an act of perversion the woman taking and having the male organ of said man in her mouth, said reel of motion picture film being a different film from others alleged in this indictment; said accused having knowledge of the obscene nature of such motion picture film and matter; said motion picture films when considered as a whole and applying contemporary community standards that exist in this county, being obscene matter whose predominant appeal is to a shameful and morbid interest in nudity and sex; and accused should reasonably have known of the obscene nature of said matter, and you believe all that beyond a reasonable doubt, you would be authorized to convict the defendant of the offense charged."

CERTIFICATE OF SERVICE

I do hereby certify that I, a member of the Bar of the Supreme Court of the United States, have this day mailed 3 copies of this Appendix by first class prepaid mail to Lewis R. Slaton, Solicitor General, counsel for Appellee, care of Fulton County Courthouse, Atlanta, Georgia 30303.

This 21 day of November, 1968.

Wesley R. Asinof

WESLEY R. ASINOF
Attorney for Appellant

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IN THE

Supreme Court of the United States

October Term, 19_____

No._____

ROBERT ELI STANLEY,

Appellant

vs.

THE STATE OF GEORGIA,

Appellee

JURISDICTIONAL STATEMENT

REPORT OF OPINION OF COURT BELOW

The opinion of the Georgia Supreme Court in this case is officially reported in 224 Ga. 259 and unofficially reported in 161 S.E.2d, 309 and a copy thereof is appended to this jurisdictional statement.

CONCISE STATEMENT OF GROUNDS OF THIS COURT'S JURISDICTION

This was a criminal proceeding brought by the State of Georgia charging the appellant with a felony, possessing obscene material in violation of Georgia Code

26-6301 as amended by an Act of the General Assembly of 1963, p. 78.

The judgment of affirmance by the Supreme Court of Georgia sought to be reviewed was dated April 9, 1968, and an order denying a rehearing was dated and filed April 22, 1968. The notice of appeal was filed in the Supreme Court of Georgia May 1, 1968.

Jurisdiction of this appeal has been conferred on this court under and by virtue of 28 U.S.C.A. No. 1257 (2).

The cases believed to sustain the jurisdiction of this court are *Lovell v. City of Griffin, Georgia,* (1938) 303 U. S. 444, (82 L. Ed. 949, 58 S. Ct. 666); *Standard Oil Co. of California v. Johnson,* (1942) 316 U.S. 481 (86 L. Ed. 1611, 62 S. Ct. 1168); *Redrup v. N. Y., Austin v. Ky.* and *Gent v. Arkansas,* 386 U. S. 767 (87 S. Ct. 1414) and *Smith v. California,* 361 U. S. 147 (80 S. Ct. 215).

The validity of a statute of Georgia is involved in this appeal, to be found in Ga. Laws 1963, p. 78, and is set forth verbatim in an appendix to this jurisdictional statement.

QUESTIONS PRESENTED BY THE APPEAL

1. Whether Georgia Code section 26-6301 (Ga. Laws, 1963, p. 78), under which the appellant was convicted, is repugnant to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing freedom of press and due process in that the statute removes the element of scienter from the definition of the offense of possessing obscene matter, and makes the mere possession of such matter a crime.

2. Whether a search warrant issued by a U. S. Commissioner authorizing a search of premises for bookmaking

records and other wagering paraphernalia, founded on affidavits that the person's home sought to be searched has not registered as a gambler under the Wagering Tax Act, is invalid since the holding by this court in *Marchetti v. U. S.*, 88 S. Ct. 697 No. 2, Oct. Term, 1967, decided Jan. 29, 1968 and *Grosso v. U. S.* 88 S. Ct. 709 No. 12, Oct. Term, 1967, decided Jan. 29, 1968.

3. Whether the Supreme Court of Georgia erred in holding and deciding that the search warrant and the search conducted thereunder were legal.

4. Whether a state officer, acting in concert with federal agents executing a federal search warrant issued for failure to register as a gambler, were constitutionally authorized to seize motion picture films concealed in a desk drawer of appellant's home on a claim by the state officer that the films were obscene where such search warrant did not describe the films to be seized and there was no prior adjudication that they were obscene.

5. Whether a state may constitutionally punish an individual for the mere possession of films alleged to be obscene where there is no evidence to show the appellant had prior knowledge that they were obscene, or that he had ever viewed them, or that he had permitted juveniles to view them, or that he was publishing them in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or that he was "pandering" them.

CONCISE STATEMENT OF THE CASE

The appellant was indicted by the Fulton County Grand Jury for the offense of possessing obscene matter, to-wit: three reels of motion picture film. (R. 11-12)

Upon his arraignment he filed a general demurrer to the indictment on three grounds. (a) That the indictment failed to charge an offense; (b) that the Act of 1963, under which the indictment was drawn, offended the State Constitution; and (c) that the Act was in conflict with the First and Fourteenth Amendments to the U. S. Constitution in removing the element of scienter from the definition of the offense. The trial court, after hearing argument of counsel, overruled the demurrer on all grounds.

Appellant also filed a special demurrer to a portion of the indictment alleging that "accused should reasonably have known of the obscene nature of said matter," contending that it violated his First and Fourteenth Amendment rights by removing scienter from the offense. This demurrer was overruled by the court.

Both the general and special demurrers, and the orders of the trial court overruling them, are contained from pages 13 through 17 of the record.

Appellant filed a motion to suppress the three reels of film from evidence (R. 29-36) on the grounds they were seized from his home by an Investigator of the Criminal Court "without a lawful search warrant particularly describing said articles to be seized," and that "no prior adjudication had been made that said articles were obscene" in violation of his First and Fourteenth Amendment rights.

Evidence was heard by the trial court on this motion, at which time the State introduced in evidence a federal search warrant and supporting affidavits issued for the violation of the Federal Wagering Tax Act (R. 37-57) (R. 87). After argument of counsel the motion was overruled. (R. 22 and 23.)

The case proceeded to trial before a jury, and a verdict of guilty was returned and sentence of one year imposed. (R. 19 and 20.)

The evidence for the State consisted of testimony by federal agents and one state officer that they searched the appellant's home pursuant to the federal search warrant for the seizure of wagering paraphernalia. They found no such articles described in the warrant, but during the course of the search discovered the three reels of film described in the indictment concealed in a desk drawer of one of the bedrooms. They found a motion picture projector and a screen, ran the film and determined in their opinion they were obscene. The films were then seized, the appellant placed under arrest and the indictment and conviction followed.

The verdict of the jury was returned January 19, 1967, sentence pronounced Jan. 19, 1967 and motion for new trial filed the same day, (R. 21) and overruled Nov. 20, 1967.

Notice of appeal to the Supreme Court of Georgia was filed December 14, 1967 (R. 6 and 7). The appellant enumerated as error the overruling of the motion to suppress evidence, the overruling of the general demurrer to the indictment, the holding by the trial court in its rulings on the demurrers that the Act of the General Assembly under which the appellant was tried was constitutional and not in conflict with the First and Fourteenth Amendments to the United States Constitution; and that the evidence did not support the verdict in that the State failed to prove that appellant exhibited the alleged obscene films to any other person. (R. 286-289).

The unconstitutionality of the Act of 1963, p. 78,

under which appellant was convicted, was first raised in the trial court by the 3rd ground of the general demurrer (R. 14 and 15) and the special demurrer (R. 17) and were overruled by the trial court (R. 16 and 18), enumerated as error in the Georgia Supreme Court, (Grounds 2, 5, and 6, R. 286 and 287) passed on by the Georgia Supreme Court adversely to appellant in the 4th section of the opinion, (R. 295, 296 and 297) and motion for rehearing on this ground was made (R. 301 and 302, ground 3).

The invalidity of the search and seizure was first raised in the trial court by the motion to suppress prior to trial (R. 29-36), overruled by the trial court (R. 22 and 23), enumerated as error in the Georgia Supreme Court (R. 286) (Ground 1), and passed on by the Supreme Court of Georgia in Sec. 1 of the opinion (R. 290). A motion for rehearing of this ground was made (R. 299, 300 and 301, grounds 1 and 2).

The insufficiency of the evidence in failing to show that appellant had exhibited the films to an unwilling individual or a minor was raised in enumeration of error No. 8 in the Georgia Supreme Court, passed upon by that Court in Sec. 6 of its opinion (R. 297), and a motion for rehearing was made on this ground in par. 4 (R. 302).

GROUNDS UPON WHICH FEDERAL QUESTIONS ARE CONTENDED TO BE SUBSTANTIAL

1.

The main question presented by this appeal involves the validity of the Georgia obscenity statute and whether it violates the First and Fourteenth Amendments in authorizing a conviction for mere possession of articles contended to be obscene in removing the element of scienter from the definition of the offense by punishing a possessor on less evidence than it takes to prove actual knowledge of its obscene nature.

The reason why this question is so substantial as to require plenary consideration is that the Georgia statute permits a conviction for possessing obscene articles *"if the defendant should reasonably have known of the obscene nature of said matter"* and thus deprives the accused of his liberty even though he has no actual knowledge that it is obscene. Such statute thus places every citizen in jeopardy of punishment by the State for possessing matter of which he may not have actual knowledge, or for believing, as he has a right to under the freedom of press clause of the First Amendment, that in his opinion it is not obscene.

Such question is also so substantial as to require plenary consideration because it deprives a citizen of the right given by the First Amendment to judge for himself, if he so chooses, as to what photographs, writings or books he may possess in the privacy of his own home.

The case believed to sustain the jurisdiction of this court on this ground is

Smith v. California,
361 U. S. 147

wherein this court held that an ordinance, dispensing with the element of scienter, in a prosecution for possession of obscene articles, was unconstitutional as in conflict with the First and Fourteenth Amendments.

It was recognized in the Smith case that in other types of offenses, such as food and drug legislation, "the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors — in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used." However, the distinction was made because "there is not specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller."

The United States Supreme Court there held that "by dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter."

If the State is prohibited, by the First and Fourteenth Amendments, from removing the element of scienter from the offense of selling or pandering obscene material, and is thus prohibited from punishing a bookseller for selling an obscene book where such seller has no actual knowledge of its contents, may the States prescribe any less a standard against those who are not charged with pandering, selling or distributing, but merely pos-

sessing the same material? To put the matter in converse, are the States to be prohibited from convicting a seller who has no knowledge of the contents of the book he is selling, but may the same State convict such seller of possessing the same book, even though he was without the same knowledge?

The indictment in this case charges the appellant with knowingly possessing obscene matter. It further charges that he should reasonably have known of the obscene nature of said matter. If he has been called upon to defend his actual knowledge, that is one thing. If he has been called upon to defend that he *should reasonably have known* of the obscene nature of said matter, that is another. If the State is able, by some sort of proof, direct or circumstantial, to show that the appellant *should reasonably have known* of the obscene nature of said matter, such proof could be adduced far short of proving the he actually *did know*. This removed the element of scienter, and thus took from the appellant the constitutional protection of the First and Fourteenth Amendments.

It would be virtually impossible for any person to have either actual knowledge that any matter is obscene, or could reasonably be expected to have such knowledge, without having actually or constructively *possessed* such matter beforehand. For an individual to have knowledge of the contents of a reel of film, or to reach a determination *of his own* that it is obscene, can be arrived at in only two ways. First, by viewing the film. Second, by having been told by another person that in his opinion it is obscene. Thus, in order to learn firsthand it would be necessary that one *possess* the film in order to see it, and thus discover for himself his own opinion of its contents. To obtain the opinion of another that such film is

obscene is to be deprived of the constitutional right to access of such picture, and thus be deprived of freedom of speech and press. Furthermore, the opinion of one man that a certain film is obscene may oftentimes not be shared by others. Consequently, in order for one to have knowledge of the contents of a film, or to make a determination for himself that it is obscene, necessarily requires its possession, and such possession has been made an offense under Georgia law.

Therefore, if A picks up a book at a newsstand or library, not knowing of its contents, he is in possession of it. If he reads it, in order to make a determination that it is actually constitutionally protected matter, and after reading it learns that it is obscene, he has violated the Georgia law because he has possessed it at the time he knows it to be obscene. Such a law is obviously unconstitutional, and can not stand. If he should only have reasonably known of the obscene nature of said matter, instead of actually having such firsthand knowledge, the unconstitutionality of such statute is further removed by one more degree.

On May 8, 1967, the United States Supreme Court decided three different cases at one time. *Redrup v. State of New York, Austin v. Kentucky,* and *Gent v. State of Arkansas,* 386 U. S. 767, 87 S. Ct., 1414, Nos. 3, 16 and 50, October Term, 1966. All three cases involved selling and offering obscene literature. All three cases were reversed on First and Fourteenth Amendment grounds. In a percuriam decision, the Supreme Court held:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. * * * In none was there any suggestion of an assault upon individual pri-

> vacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. * * * And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States*, 383 U. S. 463."

In the case at bar, the State has sought and is seeking, to deprive the appellant of his liberty upon the mere claim that he possessed, (apparently for his own use) three reels of film, contended by the State to be obscene, and that he either knew, or reasonably should have known, that they were obscene. No sale is alleged. No exhibition or attempted exhibition is alleged. No advertisement is alleged. No corruption of minors is alleged. No transportation is alleged. In fact, nothing is alleged to have been done by the appellant other than the fact that he did "possess" such matter.

The statute offends the Federal Constitution, and must be so declared.

The overruling of the general and special demurrer on these grounds was error, and such ruling should be reversed.

2.

The next question presented by this appeal is also substantial in that at the time the warrant was issued the Wagering Tax Act was being enforced under the authority of

United States v. Kahriger
345 U. S. 22
and
Lewis v. United States
348 U. S. 419

holding the statute to be constitutional.

The warrant was issued by the U. S. Commissioner on the probable belief that a lottery or wagering operation was being carried on at the residence of the appellant, and that inasmuch as sworn evidence was presented that appellant *had not registered or paid his tax as purportedly required* by federal law, a warrant should issue to require the seizure of such implements of gambling as might be found in use there.

On the 7th day of September, 1966, the date the warrant was issued and executed, the federal wagering tax act was being enforced.

However, as of this date of writing this jurisdictional statement both *Kahriger* and *Lewis* have been specifically overruled by the Supreme Court.

On January 29, 1968, two weeks after the appellant filed his original brief and enumeration of errors in the Georgia Supreme Court in this case, in the case of

> *Marchetti v. United States,*
> No. 2—Oct. Term, 1967 (36 U. S. Law Week, 4143)
>
> and
>
> *Grosso v. United States,*
> No. 12—Oct. Term, 1967 (36 Law Week 4150)

the United States Supreme Court held:

> "We conclude that nothing in the Court's opinions in *Kahriger* and *Lewis* now suffices to preclude petitioner's assertion of the constitutional privilege as a defense to the indictments under which he was convicted. To this extent *Kahriger* and *Lewis* are overruled."

In the latter cited case the unenforceability of the wagering tax act against one who has even the remotest right to claim the Fifth Amendment privilege was so strongly recognized as an inherent defense to such a charge that even the *failure of the petitioner to assert the claim of privilege was held not to constitute a waiver of the privilege.*

If, in the instant case, the Agent had seized wagering material as a result of the execution of the search warrant, a conviction based thereon would have fallen for the same reasons as those urged in *Marchetti* and *Grosso,* on the theory that appellant would not have been required to criminate himself by registering.

If, applying this same analogy to the validity of the search warrant, the appellant had registered as a gambler and paid his tax, there never would have been federal grounds for the issuance of the search warrant because he would obviously not have violated the federal statute by conducting a wagering operation. Consequently, having the constitutional right to exercise his Fifth Amendment protection by not registering as a gambler bars that same failure to register from being the basis for which a search warrant (the commencement of a prosecution) might validly issue.

The search warrant was therefore void, the seizure of the films were illegal, the finding of the trial court that as a matter of law the warrant was valid and the holding of the Georgia Supreme Court in division one of its opinion that the warrant and the search thereunder were legal, was erroneous under the Fourth and Fourteenth Amendments to the U. S. Constitution.

3.

The search and seizure question, while not an appealable question, is substantial and should be treated as a certiorariable question under 28 U.S.C.A. No. 2103.

Appellant, in his motion to suppress, alleged the films to have been seized *"without a lawful warrant."*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment Four of the United States Constitution.

Originally it was recognized by the Supreme Court of the United States in *Wolf v. People of State of Colorado,* (1949), 338 U.S. 25, that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable seizure." In *Mapp v. Ohio,* 367 U.S. 643, (1961), the Supreme Court overturned this theoretical principle of law, declaring that: "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

On the same day that *Mapp* was handed down by the Supreme Court the same principle was applied to the statutes of the State of Missouri as they authorized the search for and seizure of materials sought to be declared obscene. In *Marcus v. Search Warrants of Property,* 367

U. S. 717, the Supreme Court declared the Missouri statute to be in violation of the Due Process clause of the Fourteenth Amendment.

In *Marcus*, the appellants, owners of a newsstand where numerous books and periodicals had been seized by police officers under a warrant issued by a magistrate, moved to suppress the evidence because the procedures applied (1) "allowed a seizure by police officers 'without notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not these publications are obscene,' and (2) because they 'allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which magazines were obscene and were subject to seizure, impairing movants freedom of speech and publication'." The Supreme Court then determined that the question was "whether the use by Missouri in this case of the search and seizure power to suppress obscene publications involved abuses inimical to protected expression" and noted that the authority given to "police officers under the warrants issued in this case, broadly to seize 'obscene publications,' poses problems not raised by the warrants to seize 'gambling implements' and 'all intoxicating liquors' involved in the cases cited by the Missouri Supreme Court." The Supreme Court, after applying the foregoing principles, held:

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech."

In *Marcus*, the Supreme Court was dealing with even a stronger position insofar as the prosecution was con-

cerned. In *Marcus*, a search warrant had been obtained in the language of the statute and the complaint authorizing the police officers to seize such magazines as in his view constituted "obscene publications." In the case at bar no warrant had been obtained authorizing even this broad seizing power.

In *Marcus*, there was in existence a State statute specifically authorizing the issuance of such a warrant, and prescribing the procedure therefor. Such a warrant was obtained. In the case at bar the officer executing the search of the appellant's home did not seize any matter or thing called for by the warrant, but made a decision, *ad hoc*, that the three reels of film were obscene, without benefit of any prior adjudication by a court or the Literature Commission.

The appellant recognizes that if an officer, executing a valid search warrant, discovers evidence of another and different crime or sees what is known to be contraband, he may make a seizure, even though the warrant does not *particularly describe* the article being seized. However, as pointed out in the *Marcus* case, supra, the State court's "assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure does not therefore answer the appellants' constitutional claim, but merely restates the issue *whether obscenity may be treated in the same way*." (Emphasis added.)

In quoting from *Speiser v. Randall*, 357 U.S. 513, the Supreme Court reiterated in *Marcus* that "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for sensitive tools."

It is to be plainly noted in this case at bar that the officer, after discovering the three reels of film and making an inspection thereof, did not seek to enlist the aid of a qualified magistrate to make oath to him what he had seen, and to secure an adjudication by such magistrate that the films were obscene, so that at least the semblance of judicial authority would have been obtained so as to authorize the seizure of the films. Instead, the officer called the Solicitor General, whose duty it is to prosecute, and was advised to use "his own judgment" as to whether the films were obscene.

At what stage of the proceedings in this case did the films become obscene, so as to remove them from the constitutionally protected realm of the First Amendment, and place them in the unprotected area of "obscenity" as held in *Roth v. United States*, 354 U.S. 476? Were they obscene when the appellant first came into possession of them, if he ever did? Were they obscene when the officer first viewed them, or when he reported his findings to the Solicitor General? Did they become obscene when the Chairman and members of the Literature Commission viewed them, or did they only become obscene when the jury in this case returned its verdict finding the appellant guilty of possessing obscene articles?

What is obscenity, and how has it been defined by the courts? Did the appellant know that it was obscene before he had himself viewed it? Was the appellant able to apply the same contemporary community standards as those who later testified at the trial in making his determination that the films were obscene? All these questions, and many more, come to mind in now trying to second guess whether the officer, in making such a

determination, was applying the same standards and criteria as to those in which the appellant was asked when the films were seized.

The appellant urges that inasmuch as such a thin line exists between obscenity and non-obscenity that no one article is either all white or all black, so that a mere ministerial officer of the law, engaged in the competitive enterprise of ferreting out crime, may not be authorized to substitute his judgment for that of the appellant and make a determination, on the spot, that the films found in the desk drawer of the appellant's home were to be classified as *obscene*.

The motion to suppress the films as evidence should have been sustained, and the holding by the Georgia Supreme Court that no question of freedom of speech or of the press is involved is error.

APPENDIX

Appended hereto is a complete copy of the opinion and judgment of the Supreme Court of Georgia from which the appeal was taken in this case.

Also appended hereto is a verbatim copy of the Georgia statute to which the appeal has been taken in this case.

Apr. 9, 1968

IN THE SUPREME COURT OF GEORGIA.

24484. STANLEY v. THE STATE 708

FRANKUM, Justice. Robert E. Stanley was convicted of the offense of possessing obscene matter under an indictment framed under the provisions of Code § 26-6301. He appealed. Jurisdiction of the appeal is in this court by reason of two attacks by demurrer upon the constitutionality of the law under which the defendant was indicted and tried. The demurrer was overruled by the trial court and the appellant enumerates that judgment and other rulings of court as error. We will deal with the enumerations of error in the order in which they are made.

1. Appellant made a motion to suppress evidence to-wit: the three rolls of motion picture film seized by the officers while conducting a search of the appellant's premises. It appeared that special agents of the intelligence division of the U. S. Internal Revenue Service and an investigator from the Solicitor General's Office of Fulton County, acting under authority of a Federal Search Warrant issued by the U. S. Commissioner authorizing the search of the defendant's dwelling for certain bookmaking records particularly described in the warrant, while conducting the search discovered three rolls of motion picture film in the bedroom of the defendant, placed said film in a projector, showed said pictures and observed that said films depicted nude men and women engaged in acts of sexual intercourse and sodomy. The investigator seized said films as being contraband obscene matter possessed by the defendant in violation of Sec. 26-6301 of the Georgia Code

as amended and placed the defendant under arrest on that charge. The defendant moved to suppress the evidence on the ground that its seizure violated his constitutional rights in that it was seized under a warrant not specifically describing the thing to be seized, and before this court he relies principally upon the case of Marcus v. Search Warrant, 367 U.S. 717 (____ L. Ed.____, ____ Sup. Ct. ____). That case is clearly distinguishable from this case. The basis of the decision in that case was that the warrant under which the seizure of the lewd and pornographic material was had was not specific as to any property to be seized and was therefore a void warrant. Thus the search and seizure there was illegal ab initio. In this case it was specifically held by the trial court, in overruling the motion to suppress, that the warrant and the search thereunder were legal, and in so ruling the trial court committed no error. In Georgia "when the peace officer is in the process of effecting a lawful search," he may discover or seize "any stolen or embezzled property, any item, substance, object, thing or matter, the possession of which is unlawful, or any item, substance, object, thing or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of the State of Georgia." (Ga. L. 1966, pp. 567, 568; Ga. Code Anno. Suppl. Sec. 27-303 (e). Such seizure as was had in this case has been expressly held not to be a violation of constitutional guarantees either State or Federal. Cash v. State, 222 Ga. 55, 58 (____S.E.____); Harris v. U. S., 331 U.S. 145 (____L.Ed____, Sup. Ct.____); Palmer v. U. S. (CCA, DC), 203 Fed. 2d 66; Johnson v. U.S. (CCA,

DC), 293 Fed. 2d 539; U. S. v. Eisner (CCA 6) 297 Fed. 2d 595).

Even if it be said that the ruling made in the Marcus case is, in terms, broad enough to encompass the seizure of the lewd, lascivious and pornographic material involved in this case, it must be observed that the ruling made in that case was made with relation to and in the context of Constitutional guarantees of freedom of the press and freedom of speech. Here no such question is involved. There is no merit to the appellant's contention in this regard and the trial court did not err in overruling the motion to suppress the evidence.

2. The indictment in this case which charged that the defendant on a specified date "did knowingly have possession of obscene matter," thereafter describing three rolls of motion picture film in detail and concluding with the allegation: "said accused having knowledge of the obscene nature of such motion picture film and matter; said motion picture films when considered as a whole and applying contemporary community standards that exist in this county, being obscene matter whose predominant appeal is to a shameful and morbid interest in nudity and sex; and accused should reasonably have known of the obscene nature of said matter, said act of accused being contrary to the laws of said state, the good order, peace and dignity thereof," sufficiently charged the defendant with an offense under the provisions of Code Sec. 26-6301, as amended by the act approved March 13, 1963 (Ga. L. 1963, p. 78 et seq.). It is not essential to an indictment charging one with possession of obscene

matter that it be alleged that such possession was "with intent to sell, expose or circulate the same."

3. The contention that the act approved March 13, 1963, is unconstitutional, null and void on its face in that it was passed and enacted by the general assembly of Georgia as an amendment to a code section which had previously been declared to be unconstitutional (Simpson v. State 218 Ga. 337 (.... S.E.....) is without merit. Section 1 of the 1963 Act clearly states that "Code Chap. 26-63 . . . as amended, particularly by an Act approved March 17, 1956 (Ga. L. 1956, p. 801), is hereby amended . . ." The 1956 Act had in a similar fashion amended Chapter 26-63 by striking therefrom Code Sec. 26-6301 and inserting in lieu thereof a new section to be numbered Section 26-6301 and it was that section as reenacted in 1956 which was held to be unconstitutional in Simpson v. State supra. The fact that the 1963 Act particularized the portion of Code Chap. 26-63 to be amended and referred to Sec. 26-6301 and further provided that the Chapter, should be amended by striking that code section in its entirety (which was the effect of this court's ruling in the Simpson case) in no way vitiated the effect of the act to amend Code Chap. 26-63.

4. Defendant contended in the 3rd ground of his general demurrer to the indictment that the law under which he was indicted is unconstitutional, null and void as in conflict with the first and 14th Amendments to the Constitution of the United States guaranteeing freedom of the press and due process of law in that it seeks to punish persons charged with the violation of the law if they reasonably should

know of the obscene nature of such matter, it being contended that the requirement of reasonable knowledge would withdraw the element of scienter from the definition of the offense and would render a person guilty without actual knowledge of the obscene nature of the matter. This contention is without merit. As we construe the statute the language "if such person has knowledge or reasonably should know of the obscene nature of such matter," merely amounts to a statutory expression of a rule of evidence which has been extant in this state over many years. Whether a person has knowledge of a fact is a matter peculiarly within the mind of such person, and it is rarely if ever that the defendant's guilty knowledge is susceptible of direct proof. For this reason this court has adhered to the principle that guilty knowledge may be shown by circumstances as well as by actual and direct proof. Rivers v. State, 118 Ga. 42 (2) (____S.E.____); Birdsong v. State, 120 Ga. 850, 852 (3) (____S.E.____). Therefore, if the evidence shows that the defendant knowingly possessed matter which is obscene and that he reasonably should have known of its obscene nature, and this latter fact is shown by circumstances relating to the way and manner in which he came into the possession of the matter or relating to the length of time he has had possession of it, coupled with a showing that such defendant is sufficiently informed as to the community standards as to be chargeable with knowledge of the obscene nature of the matter then he can be convicted even though direct proof of his actual knowledge of the obscene nature of the matter is incapable of being produced. The statute is therefore not unconstitutional for any of the rea-

sons urged and the trial court did not err in overruling the general and special demurrers of the defendant in which sought to raise this issue.

5. Appellant filed a plea in abatement in which he made the contention that since the matter he was charged with possessing had not been declared to be obscene by a court of competent jurisdiction in accordance with the provision of the act approved March 3, 1964 (Ga. L. 1964, p. 161-65; Code Ann. Suppl. Chap. 26-63A) as required by Section 2 of the Act approved April 1, 1965 (Ga. L. 1965, p. 489) that he could not be prosecuted for merely possessing the films in question. This contention is without merit. The provisions of Section 2 of the Act of 1965 apply only to that act, that is, to the provisions of Section 1 of the 1965 Act which added a new section to be known as Code Sec. 26-6301.1 and those provisions do not apply to Code Sec. 26-6301 under which the appellant was prosecuted. Furthermore the provisions of the 1965 Act apply only to pornographic literature, and the matter for the possession of which the defendant was prosecuted in this case was in no sense literature as that term is defined by recognized authorities. See, for example, Websters New World Dictionary of the American Language, p. 856.

6. The evidence authorized the verdict and no error of law appearing the judgment will be affirmed.

Judgment affirmed. All the Justices concur.

24484

SUPREME COURT OF GEORGIA

Atlanta, April 9, 1968.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Robert Eli Stanley v. The State.

This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Bill of Costs, $30.00

CRIMES – SALE, POSSESSION, ETC. OF OBSCENE MATTER.

Code § 26-6301 Amended.

No. 53 (House Bill No. 132).

An Act to amend Code Chapter 26-63, relating to obscene pictures and abusive and vulgar language, as amended, particularly by an Act approved March 17, 1956 (Ga. L. 1956, p. 801), so as to provide that any person who shall knowingly bring, or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print, any obscene matter

with intent to sell, expose, or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years; to provide that upon the recommendation of the jury, said offense may be punished as for a misdemeanor; to provide for definitions; to provide for severability; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Code Chapter 26-63, relating to obscene pictures and abusive and vulgar language, as amended, particularly by an Act approved March 17, 1956. (Ga. L. 1956, p. 801), is hereby amended by striking Code section 26-6301 in its entirety, and inserting in lieu thereof a new section 26-6301 to read as follows:

"26-6301. Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years; provided, however, in the event the jury so

recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion."

Section 2. In the event any section, subsection, sentence, clause or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses or phrases of this Act, which shall remain of full force and effect, as if the section, subsection, sentence, clause or phrase so declared or adjudged invalid or unconstitutional was not originally a part hereof. The General Assembly hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional.

Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 13, 1963.

CONCLUSION

The questions involved in this appeal are substantial and of gravity and importance. If any of the questions have been improvidently taken by this appeal where the proper mode of review is by petition for certiorari, appellant requests this appeal and the papers whereon the appeal was taken be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken.

28 U.S.C.A. No. 2103
Com. of Pa. v. Bd. of Dir. of City Trust of Phila.
353 U.S. 230.

Respectfully submitted,

WESLEY R. ASINOF
Counsel for Appellant
3424 First Nat. Bank Bldg.
Atlanta, Ga. 30303

SUPREME COURT, U. S.

AUG 5 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 293

ROBERT ELI STANLEY,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

Motion to Dismiss the Appeal and Affirm the Judgment and BRIEF OF APPELLEE

LEWIS R. SLATON
Solicitor General
Atlanta Judicial Circuit

J. WALTER LECRAW
Assistant Solicitor General
Atlanta Judicial Circuit

J. ROBERT SPARKS
Assistant Solicitor General
Atlanta Judicial Circuit

Fulton County Courthouse
Atlanta, Georgia 30303

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 293

ROBERT ELI STANLEY,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Under the authority of Rule 16 of the Supreme Court Appellee files this Motion to Dismiss the appeal, or, in the alternative, to affirm the judgment of the lower court. The decision of the court below, the Supreme Court of Georgia, is published in 224 Ga. 259 and in 161 S.E.2d, 309.

GROUNDS OF MOTION TO DISMISS

Appellee moves to dismiss the appeal upon the ground

that it does not present a substantial federal question, and on the ground that the judgment rests on an adequate non-federal basis. This is more particularly set forth as follows:

Appellant's contention that the Georgia Obscene Matter Statute "removes the element of scienter" is not well founded. The statute does not remove the element of scienter. The statute has been construed by the Supreme Court of Georgia in the decision in this case. Said decision interpreting the statute held that the statute did not withdraw the element of scienter. The decision said that the "contention" that the statute withdrew the element of scienter was "without merit". (4th division of Opinion)

The decision went on to say that the language upon which Appellant relies, towit: "if such person (an accused) reasonably should know of the obscene nature of such matter" merely amounts to a statutory expression of "a rule of evidence which has been extant in this State over many years." The decision pointed out that "whether a person has knowledge of a fact is a matter peculiarly within the mind and it is rarely if ever that the defendant's guilty knowledge is susceptible of direct proof," and that all the surrounding circumstances may be shown as bearing upon the question whether the accused had knowledge of a certain thing or not.

In this appeal, the Georgia statute comes before the Court *as interpreted* by the Georgia Supreme Court. The authoritative interpretation by the State Supreme Court "puts these words in the statute as definitely as if it had been so amended by the Legislature." *Cramp v. Board of Instruction*, 368 U.S. 278, 82 S.Ct. 275 (5).

When it is considered that the Georgia statute does not eliminate the element of scienter, as construed by the Georgia court, then knowledge by the accused of the obscene nature of the literature or matter remains as a necessary element of the offense. The statute therefore does not come under the proscription of *Smith v. California*, 361 U.S. 147, which Appellant invokes.

Only the first of the "Questions Presented by the Appeal" presents a question which Appellant claims to authorize jurisdiction for this appeal. That is the Question in which Appellant contends that the Statute "removes the question of scienter." Since this first Question is not valid, and should fall, in the light of the Georgia Supreme Court's interpretation of the Statute, there is no proper basis for jurisdiction in this appeal.

GROUNDS OF MOTION TO AFFIRM

We make the motion to affirm the judgment of the lower court upon the ground that it is manifest that the questions on which the decision of this cause would depend are so unsubstantial as not to need further argument. If this Court were presented with an Obscene Matter Statute which did in fact withdraw the element of scienter, an entirely different question would be presented. But since in the present case the state statute retains the element of scienter, and only sets up a rule of evidence as to how scienter might be proved circumstantially, this appeal should be dismissed and the judgment of the lower court affirmed.

Since RULE 16 allows the appellee to present "any other grounds" as reasons why the MOTION TO AFFIRM should be granted, we suggest that the Court

consider at this point that this is a case of HARD-CORE PORNOGRAPHY, being a case of possession of three reels of motion picture films showing nude men and nude women engaging in acts of sodomy and sexual intercourse (for further description see the indictment and the evidence), the condition of said films showing that they were not newly made films but considerably used, and the possession being shown to be under such circumstances that the jury was authorized to find that some people were about to gather in defendant's house for the exhibition of these motion pictures, that a projection machine was in the home available for the projection of said pictures for viewing by such audience, and that the defendant knew of the obscene nature of said pictures.

APPELLANT'S PETITION FOR CERTIORARI PRESENTS NO SUBSTANTIAL ISSUE

We note that appellant's petition for appeal contains also the request that it be considered as a petition for certiorari, in the event it is dismissed as an appeal. On this phase of the case we make this Response and pray that the petition for writ of certiorari be denied, setting forth our reasons herein, with citations. We first give a summarized Response to the five Questions which Appellant says are presented:

QUESTIONS PRESENTED

1. Appellant's first question should have the last three lines stricken, since the Georgia statute does not remove the element of scienter. The Question then remains: Whether the Georgia Code section 26-6301, under which Appellant was convicted, is repugnant to the

First and 14th Amendments to the Constitution of the United States guaranteeing freedom of press and due process.

2. Question 2 might remain substantially as Appellant presents it. But it omits one important item for consideration, the time. The Question might be put this way: Whether *Marchetti v. U.S.*, decided January 29, 1968, rendered null and void a search warrant which had been issued September 7, 1966, for gambling material, wagering paraphernalia, etc.

3. This question can remain the same, but it is very indefinite and does not present any clear federal question as to validity or invalidity of the search warrant.

4. This is not a clear statement of a Question for decision. First, it says that the federal search warrant was "issued for failure to register as a gambler." This is an incorrect reference to the search warrant. It issued for the search of a 2-story residence for gambling material, wagering paraphernalia, and other described things. Next it merges two entirely separate questions into one clause of the statement, in the last two lines. It suggests a question whether officers executing a search warrant can ever seize an article of alleged contraband which was not described in the warrant. And it suggests a question as to whether a hard-core obscene motion picture film could ever be seized without a "prior adjudication" of obscenity. Both of these are "questions" but they are not necessarily federal questions when arising in a state trial for violation of a state statute.

5. Number 5 is not a proper Question. It includes an absolutely incorrect assumption, towit: ". . . where there is *no evidence* to show the appellant had prior

knowledge that they were obscene." This statement fails to recognize that there can be *circumstantial* evidence of any fact necessary to be proved in a criminal trial, and particularly in the area of knowledge and intent, where circumstantial evidence is recognized by the law as usually the only kind of evidence available.

REASONS FOR AFFIRMING THE JUDGMENT AND NOT GRANTING CERTIORARI

No Constitutional Protection For Hard-Core Pornography

Even though Appellant's contention that the Georgia statute eliminates scienter is not sound, his contention remains that the statute violates the constitutional provisions of freedom of speech and of the press. *Smith v. California*, 361 U.S. 147, upon which Appellant places so much reliance, dealt with a Los Angeles City Ordinance which in fact did remove the element of scienter from its obscene literature statute. One glance at the Los Angeles ordinance shows that scienter was eliminated. And for that reason the ordinance was held unconstitutional, as curtailing freedom of speech and press. Since the Georgia statute does not remove scienter, as we pointed out in our Motion to Dismiss or Affirm, the *Smith* case can give Appellant no benefit.

As held in *Roth v. United States*, 354 U.S. 476, obscenity is not within the area of constitutionally protected speech or press. The language of this decision indicates that the Court recognized that there may be considerable difference between one type of alleged obscene matter and other types. This difference in type, or difference in degree, was referred to by Mr. Justice Stew-

art in his concurring Opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 84 S.Ct. 1676, in which he said:

> "I have reached the conclusion, which I think is confirmed at least by negative implications in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography."

Justice Stewart did not attempt to define what would be hard-core pornography. But we are sure that the present case is an example of it. We challenge the imagination to produce more hard-core pornography than the motion pictures contained in the films in the present case!

They are in the evidence, for the Court to see, if the description in the Record is not sufficient.

Appellant's contention that the Georgia statute violates the constitutional provisions of freedom of speech and press, even as applied to such extreme pornographic matter as that in the present case, is not sound and should not be sustained.

State May Penalize Possession of Forbidden Articles Without Violating Constitution

Appellant criticizes the Georgia statute for penalizing what he terms the "mere possession" of these alleged obscene films. See his 5th Question, on page 3 of his Statement, and also his page 7 where he contends that the statute violates the First and the 14th Amendment.

There can be no doubt that the individual states have the constitutional power to pass legislation penalizing the *possession*, knowingly, of many things. Examples are:

Mere *possession* of stolen goods, with knowledge that they have been stolen, is made a crime in all jurisdictions that we know of. A New Jersey statute not only made possession of stolen goods a crime but provided that possession within a year from the date of the stealing would make a prima facie case, and "be deemed sufficient evidence to authorize conviction." This was held constitutional. *State v. Todaro,* 37 Atl.2d, 73 (1). Appeal was taken to the United States Supreme Court, 1944, where it was "dismissed since the application in this case of New Jersey's Rev. Stat., Tit.2, Ch.164, sec. 1, presents *no substantial federal question.*" *Todaro v. New Jersey,* 323 U.S. 667, 65 S.Ct. 73.

In *12 C.J. Secundum, page 753,* dissussing the crime of *possessing* burglarious tools, it is stated that "under some statutes the bare possession of such tools and implements is an offense irrespective of the intent, and under statutes of this character the tool or implement must be one peculiarly adapted to the commission of burglary in order to render its possession a crime." It is pointed out by the above text and notes thereunder that a jury may infer the defendant's intent to use the articles in committing crime from the nature of the articles and the circumstances under which possessed.

Some jurisdictions penalize the *possession* of intoxicating liquor, some penalize the *possession* of more than a certain amount of it, and some penalize the *possession* of apparatus for making it, commonly called whiskey stills, without a license. Long before prohibition became a national issue, it was settled that "a state may prohibit and punish the *possession* of intoxicating liquors." *Crane v. Campbell, Sheriff* (1917), 245 U.S. 304, 38 S.Ct. 98.

The *possession* of weapons is made a crime, under certain circumstances, varying considerably in different jurisdictions. The *possession* of a pistol concealed on one's person is frequently made a crime. In *People v. Saltis*, 328 Ill. 494, 160 N.E. 86, an Illinois statute was held constitutional which penalized the carrying of concealed weapons in one's possession, excepting police officers, wardens, etc., and there was an appeal taken to the United States Supreme Court where the appeal was "dismissed for want of jurisdiction in the Supreme Court for the reason that the federal questions sought to be presented are frivolous." *Saltis v. Illinois*, 277 U.S. 676, 48 S.Ct. 530. Even more stringent laws exist as to the possession of automatic weapons such as machine guns.

State laws generally penalize the mere *possession* of forged checks, notes, bills, etc., with knowledge that they have been forged. These laws are discussed in 37 C.J.S. page 60, under title Forgery.

The keeping or *possessing* of gaming tables or gambling paraphernalia, for the purpose of allowing games of chance to be played with them, is penalized in most of the states. This is discussed in 38 C.J.S. 154 et seq., under the title Gaming. And on page 158 it is pointed out that some states penalize the possession of slot-machines controlled by the deposit of a coin, without regard to whether the playing amounts to gambling. Several cases cited in the notes under above text refer to the purpose of penalizing the possession of gambling devices, for example, page 154 cites *People v. Crawford*, 25 N.Y.S.2d 259, as saying that the purpose of the legislation was "to combat an evil which constitutes not merely a form of gambling but a positive menace to every commu-

nity." (We feel that we can say that the possession of such hard-core pornographic motion picture films as in the present case constitutes a menace to the community in a very real sense, on a par with the keeping of gambling devices.)

The United States Government itself has many laws on the statute books penalizing the *possession* of various things, under various circumstances, for example: the possession of counterfeit currency, the possession of counterfeiting apparatus, the possession of blank cards of a draft board by one not entitled to such possession. As an example of the seizure of such illegally possessed draft cards, see *Harris v. State,* 331 U.S. 145, 67 S.Ct. 1098.

We cannot hope to list here all the instances in which valid laws are enacted penalizing *possession* of various things under various circumstances.

Our purpose in listing some such instances here is to point out that appellant's claim is unsound, when he contends that the Georgia obscenity statute violates the First and 14th Amendments of the U.S. Constitution merely because it penalizes the possession (knowingly) of pornographic films such as these.

It is true that the Supreme Court has held in *Smith v. California,* 361 U.S. 147, that the bookseller could not be penalized for having obscene material on his bookshelves, when he had no knowledge of the obscene nature of such material. That decision was limited to books, and the Court did not hold that a person could not be penalized if he *did have knowledge* of the obscene nature of the material.

We recognize that the Court held in *Redrup v. New*

York, 386 U.S. 767, and in the *Austin and Gent* cases, decided simultaneously, that the penalizing of the alleged obscene literature there set forth violated the Constitution. But the Court did not rule out all obscene literature prosecutions as being unconstitutional.

In *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, a conviction was allowed to stand, involving as it did the sale of obscene literature to a minor, in violation of a New York statute. The Court reiterated the statement of the ROTH case, *supra*, that "obscenity is not within the area of protected speech or press."

In division II of the GINSBERG decision (page 1283 of 88 S.Ct. Reporter), it was pointed out that there was a "challenge to the *scienter* requirement of the statute, and that the challenge centers on the definition of 'knowingly' insofar as it includes 'reason to know' or 'a belief or ground for belief which warrants further inspection or inquiry or both.'" After discussing the alleged insufficient requirement of scienter, the GINSBERG decision refuses to hold that the element of *scienter* is insufficiently incorporated in the statute. The statute in question penalized the proscribed acts if "knowingly" made, and defined the word as follows:

> "(g) Knowingly means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both."

The above is somewhat similar to the Georgia statute under consideration, which used the word "knowingly" and later in the statute used the words "if such person has knowledge or reasonably should know of the obscene nature of such matter," the latter words being held by

the Georgia Supreme Court to be merely a statutory expression of a rule of evidence.

Scienter remains an element of the Georgia statute, just as it was held to remain a requirement of the New York statute under consideration in the GINSBERG case. The Georgia statute passes the constitutional tests suggested in all of the foregoing cases, and should therefore be held not invalid for any reason upon which it is attached.

Marchetti Case did not Render Void the Search Warrant of Sept. 7, 1966

Under Question 2, as presented by Appellant, he contends that the case of *Marchetti v. U.S.*, 390 U.S. 39, 88 S.Ct. 697, which was decided January 29, 1968, rendered void the search warrant which had been issued by U.S. Commissioner Holden on September 7, 1966. We have read the MARCHETTI decision and find nothing in it which says or indicates that all search warrants issued for search of premises for gambling paraphernalia are void.

The holding was that in a federal prosecution for alleged evasion of payment of federal occupational tax on wagering and for failure to register and pay such tax, the "defendant's assertion of privilege against self-incrimination constituted a complete defense to the prosecution."

In the present case the accused Stanley presented no claim of self-incrimination at his trial. His present claim, in this regard, is merely an afterthought. The MARCHETTI case contained no holding that all persons in past convictions of whatever crimes, state or federal,

could have their convictions voided under this sort of contention. In the present case the contention is not valid, not based upon any previous contention or ruling in the prior history of the case.

The MARCHETTI case does not even hold that all *prospective* search warrants issued by federal magistrates for search and seizure of gambling paraphernalia would be void. It certainly does not hold that all *prior* search warrants issued by federal magistrates for search and seizure of gambling paraphernalia are void. The Court declared in MARCHETTI:

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements."

In view of the above, it can hardly be maintained that the MARCHETTI decision rendered void all search warrants issued by federal magistrates for gambling paraphernalia, prospective and past.

Many Constitutional Rulings Held Not to Have Retroactive Effect

The United States Supreme Court has made many rulings on constitutional questions, especially in the realm of criminal prosecutions, that were declared to apply prospectively and not retrospectively.

In *Mapp v. Ohio*, 367 U.S. 643, the Supreme Court made an important new ruling in the realm of search and seizure, but held it was not retroactive in *Linkletter v. Walker*, 831 U.S. 618. In *Griffin v. California*, 380

U.S. 609, the Court made an important constitutional ruling on the prosecution's comment on a defendant's failure to testify, but in *Tehan v. Shott*, 382 US. 406, held it would not be applied retroactively. In *Miranda v. Arizona*, 384 U.S. 436, the Court established drastic new constitutional rules as to admissibility of confessions when a defendant had not been warned in certain respects, but in *Johnson v. New Jersey*, 384 U.S. 719, the Court held this ruling not to be retroactive. In *U.S. v. Wade*, 388 U.S. 218, the Court held that identification testimony based upon earlier identification of a prisoner in the absence of his lawyer would not be admissible, but in *Gilbert v. California*, 388 U.S. 263 held this ruling would not be applied retroactively.

Very forceful reasons were given in some of the above decisions as to why the rulings referred to would not be applied retroactively, including the "serious impact" and "serious disruption" that would follow the retroactive application of such rulings upon the administration of criminal laws. The same logic applies with great force in the present situation. For the reasons cited in the above decisions, we earnestly submit that the ruling in MARCHETTI should not be given retroactive application, and especially should not be held to render void a search warrant for gambling paraphernalia which had been issued by a U.S. Commissioner 16 months prior thereto.

Seizure of Articles Illegally Possessed Tho' Not Described in the Warrant Was Proper

Under Questions 3 and 4, Appellant contends that the seizure of the films was illegal because they were not

described in the search warrant. The Search & Seizure law of Georgia, Ga. Laws 1966, page 567, 569, says that when an officer is in the process of effecting a lawful search he is not limited to seizing the particular objects described in the search warrant, but may seize any object, thing or matter, the possession of which is unlawful, or any object, thing or matter, other than the private papers of any person, which is tangible evidence of the commission of a crime against the laws of Georgia.

This same legal principle has been upheld in federal cases. In *Harris v. U.S.*, 331 U.S. 145, 150, 67 S.Ct. 1098, some officers had arrested Harris in the living room of his home on a warrant charging mail fraud, and then began search of his apartment for certain documents which they believed would support the charge. In the course of that search they found something else, towit: some draft cards which were the property of the United States and had been stolen. The above decision held that "even though obtained by agents searching for evidence in connection with a different charge against the accused, the draft cards were not seized in violation of the Fourth Amendment against unreasonable searches and seizures.

The HARRIS case has been cited and followed in a number of other federal cases, among them being:

DiMarco v. Green, 385 F.2d 556 (5), 560, 5th Cir., 1967, upholding the seizure of burglary tools found in defendant's automobile upon his being lawfully arrested in the auto for a parole violation.

Aron v. U.S., 382 F.2d 965 (10, 11), 974, 8th Cir., 1967, upholding the seizure of stolen postage stamps

when the search warrant was for stolen U.S. Savings stamps.

Thompson v. U.S., 382 F.2d 390 (1, 3, 4) 9th Cir., 1967, upholding the seizure of unlawfully possessed marijuana, accidentally found in defendant's room by officer who had been voluntarily invited there.

U.S. v. Eisner, 297 F.2d 595 (7), certiorari denied, 369 U.S. 859, holding that an officer making a valid search under a search warrant could lawfully seize certain stolen articles (furs) although they were subject-matter of a different crime.

Marcus Decision Is Distinguished From the Present Case

On pages 14 to 16, appellant cites and relies upon *Marcus v. Search Warrants of Property*, 367 U.S. 717. In that case the ruling was far different from the question presented in this case. The MARCUS decision states, at its beginning: "This appeal presents the question whether due process under the 14th Amendment was denied the appellants by the application in this case of Missouri's procedures authorizing the search for and seizure of *allegedly obscene publications* preliminary to their destruction by burning or otherwise if found by a court to be obscene." No description of the publications was required by the statute and none was given in the search warrants. Under the search warrants the Missouri officers seized "approximately 11,000 copies of 280 publications." (Page 723) After being under seizure for two months, 180 of the publications were found by a court to be not obscene and ordered returned. (Pages 732-733)

The United States Supreme Court was greatly concerned over the curtailment of freedom of speech and of press as applied to those 180 publications which were withheld from the bookshelves for over two months, although not obscene and eventually ruled so by the court. The decision said that "Mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression." (Page 738)

No analagous situation exists in the present case. Freedom of Speech or Press is not involved, under the ROTH case ruling that obscenity is not within the area of constitutionally protected speech or press. No such unconstitutional seizure of quantities of non-obscene matter took place, as in MARCUS.

Facts and Circumstances Authorized Finding That Stanley Had Knowledge of Obscene Nature of the Films

Question 5 is the one which makes an incorrect assumption that "there is no evidence to show the appellant had prior knowledge" that the films were obscene. While the State did not have "direct evidence" of what was in his mind, there were facts and circumstances shown which were sufficient to authorize the finding that he did have knowledge of the obscene nature of the films.

As said in *Smith v. California*, 361 U.S. 147, 154, "it has been some time now since the law viewed itself as impotent to explore the state of a man's mind," even in the absence of direct evidence. And in discussing the method of proof that a bookseller had knowledge of obscene matter in a book, the SMITH case said:

"The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (Page 154)

Among the facts and circumstances which as a whole would authorize the finding that he had knowledge of the obscene nature of the films we might cite the following: (The pages listed are the page numbers at the bottom of the pages in the Georgia Supreme Court transcript of the evidence, which may be different from the new page numbers on the record sent up to the United States Supreme Court):

— The three motion picture films were found in a desk drawer in the master bedroom on the 2nd floor. (99, 111-112)

— This was the home of just one individual person, a bachelor, towit: Robert Eli Stanley. (86, 90, 101, 111)

— In a different room on the 2nd floor was a motion picture projection machine, which was used by the officers to view the films. (92, 100, 131)

— In the desk where the films were found were letters addressed to the defendant and stock brokerage forms with his name on them, and other papers bearing his name, these indicating his personal contact with the location. (101)

— There was also a motion picture screen up there in that second floor room. (103, 94-95)

— In the room where the films were found there was a closet in which were numerous suits, some of which had laundry marks with appellant's name on them. (101-102)

— Before leaving with the officers for police headquar-

ters, the defendant asked to get his coat, and went to the bedroom referred to and got his coat out of the closet there to go with them. (97)

— The three films found by the officers were badly scratched and dirty, and one of them had been rewound backwards, indicating that they were not in new condition and "obviously had been shown before." This was testified to by Officer Farr, who had been a professional photographer for 3 years and was familiar with films and projection machines. (131, 132)

— When the officers arrived, around 6:00 p.m., the dining room table was set for eight people; plates, knives and forks set in place; and in the kitchen was a large pan with about 2 dozen prepared uncooked biscuits covered by a cloth ready to go in the oven. (89, 91)

— After the officers arrived, several visitors arrived or came to the back door to enter, but were turned away; first was a lady, then a man, then two young ladies came to the back door to enter; they were well dressed people. (90-91)

— The three rolls of films showed "men and women, naked men and women having sexual relations, acts of perversion . . . acts of sodomy." (101)

It would be a reasonable conclusion or inference from all the facts and circumstances that the appellant put the films in this private and concealed location, where he had other documents and objects of a personal nature, because he had knowledge of the contents of the films and wanted to keep them within his own private control and have them available for display or use at such time as he chose to display them; that they had been previ-

ously displayed by him or in his presence, and that a group of people were about to gather at this private home of the appellant for a supper-party, with these obscene films available for showing to such persons for their entertainment within a few feet of where the supper-table was laid out for their repast!

Proof Showed Community Standards and the Extreme Obscene Nature of These Films

We should probably add, before closing, that the State showed by testimony in this trial that the predominant appeal of these films was to a "shameful and morbid interest in nudity and sex." This was shown by people who testified that they were familiar with the contemporary community standards with reference to morality and decency in Fulton County, and some in particular portions of Fulton County, and from that knowledge gave their opinion of these films as above set forth. Some testified that the films and their contents had "no redeeming social value" based on their described knowledge of such subject. One such witness was a police officer (page 116); one was a Gulf filling station proprietor (161); one was an attorney and prosecuting officer (168-169 et seq); one was a retired locomotive engineer (177 et seq); one was an optometrist with office at 864½ Hunter Street, S.W., doing business in that Southwest community of Atlanta, Fulton County, (183 et seq); one was a colored real estate dealer living at 1487 Mozley Drive, S.W., with offices at 905 Hunter Street, N.W. (192 et seq); another was an assistant solicitor general who had been engaged in contact with prosecuting work for over 30 years and residing in Fulton County. (200)

Another testifying to the above effect as to the nature of the three films, which he had viewed, was Dr. James P. Wesberry, Baptist pastor and chairman of the Georgia Literature Commission, who testified that during the 13 years he had been a member of that Commission he had had a great many occasions to examine and look at matter alleged to be obscene, and that from his knowledge of the contemporary community standards of decency he could say that the predominant appeal of these films was a shameful and morbid interest in nudity and sex, *extremely so* (138), that there is no redeeming social value or importance whatsoever in these films (139), and that they were the "most obnoxious, nauseating, sickening, foul and disgusting" that he had seen in his life. (140)

CONCLUSION

For the foregoing reasons, Appellee urges that this Court dismiss the appeal and affirm the judgment and deny the petition for certiorari in this case.

Respectfully submitted,

LEWIS R. SLATON
Solicitor General
Atlanta Judicial Circuit

J. WALTER LECRAW
Assistant Solicitor General
Atlanta Judicial Circuit

J. ROBERT SPARKS
Assistant Solicitor General
Atlanta Judicial Circuit

Fulton County Courthouse
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document, including motions and brief, upon opposing counsel in this case, by mailing a copy of same to Hon. Wesley R. Asinof, counsel for appellant, at his office, 3424 First National Bank Building, Atlanta, Georgia 30303.

This August 2, 1968.

J. WALTER LECRAW
Of Counsel for Appellee

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 293

ROBERT ELI STANLEY,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION TO DISMISS THE APPEAL AND AFFIRM THE JUDGMENT

AUTHORITY TO FILE BRIEF

This brief in opposition to Appellee's Motion to Dismiss and to Affirm is being filed in accordance with and pursuant to Rule 16 (4) of the Rules of the Supreme Court of the United States.

GROUNDS OF APPELLEE'S MOTION TO DISMISS

The motion to dismiss the appeal is totally without merit. The judgment from which the appeal was taken does not rest upon an adequate non-federal basis as contended by the appellee, and the jurisdiction of this court has not been divested by the Supreme Court of Georgia.

The statute, (Ga. Code Ann. 26-6301), which is under attack by this appeal, authorizes a conviction for knowingly *having possession* of any obscene matter "if such person has knowledge or reasonably should know of the obscene nature of such matter." Thus, while actual knowledge of the obscene nature of the matter is made one of the elements of the crime it is not an indispensable requirement to authorize a conviction. If the possessor "reasonably should know of the obscene nature of such matter" this will supply the necessary ingredient to attach criminality to the possessor.

The Georgia Supreme Court summed up the contentions of the parties, and made their ruling thereon as to this question in division 4 of its opinon. The Court stated that the defendant contended that the law "under which he was indicted is unconstitutional, null and void as in conflict with the First and Fourteenth Amendments to the Constitution of the United States guaranteeing freedom of the press and due process of law," etc., but held that the language of the statute therein complained of "merely amounts to a statutory expression of a rule of evidence which has been extant in this state over many years."

The Georgia Supreme Court then decided the federal

question without any regard to a non-federal basis by holding as follows:

> "The statute is therefor not unconstitutional for any reasons urged and the trial court did not err in overruling the general and special demurrers of the defendant in which sought to raise this issue."

Whether the controversial phrase of the statute was held by the state court to be "a statutory expression of a rule of evidence" or a substantive "escape hatch" to be used by the state to secure a conviction on evidence less than actual knowledge is not relevant to the issue of whether the state judgment rests on a non-federal, as distinguished from a federal basis. Thus, the jurisdictional question of whether the State of Georgia may authorize a conviction for the *mere possession* of obscene matter on evidence less than, or a finding short of, actual knowledge by the possessor that the article is obscene, has been squarely decided by the Georgia Supreme Court and is now directly before this Court.

The appellee has clearly misinterpreted Rule 16 (1) (b) of this Court by contending that the judgment of the state court "rests on an adequate non-federal basis." The absence of citation of authority for its novel position illustrates the very weakness of its position.

Examples of the application of this rule exist where the federal question is not properly raised under state procedural requirements and the state court refuses to rule on the federal question, declining to do so on *adequate* non-federal grounds.

***Stembridge v. State of Georgia*, 343 U.S. 541 (72 S.Ct. 834); *Hedgebeth v. State of North Carolina*, 334 U.S. 806 (68 S.Ct. 1185); *Holley v. Lawrence*, Warden, 317 U.S. 518 (63 S.Ct. 394).**

Even in these instances, however, the jurisdiction of the United States Supreme Court is not defeated if the non-federal ground of the state court's decision is without any fair or substantial support.

***National Association For The Advancement Of Colored People v. State of Alabama*, 357 U.S. 449 (78 S.Ct. 1163); *Ward v. Board of County Commissioners*, 253 U.S. 17 (40 S.Ct. 419); *Abie State Bank v. Bryan*, 282 U.S. 765 (51 S.Ct. 252); *N.A.A.C.P. v. Flowers*, 377 U.S. 288 (84 S.Ct. 1302); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36 (64 S.Ct. 384).**

On page 2 of the appellee's motion to dismiss, the following statement appears:

> "Said decision interpreting the statute held that the statute did not withdraw the element of scienter."

We wish to challenge this statement as not being borne out by the record in the case. Nowhere in the opinion of the Georgia Supreme Court was it held "that the statute did not withdraw the element of scienter." We invite the Court to inspect the opinion itself.

As we view the opinion, it authorized a conviction on less evidence than it would take to prove actual knowledge, or *scienter*. The opinion assumed that even though a possessor was not shown to have actually known that an article was obscene, if a jury found from circumstances that the possessor "reasonably should" have known of its obscene nature, they should convict. This is in effect what the Georgia Supreme Court ruled when they held that the statute did not offend the First and Fourteenth Amendments. This is the constitutional issue presented to this court on appeal.

GROUNDS OF APPELLEE'S MOTION TO AFFIRM

Appellee makes the statement in its motion to affirm that the questions "are so unsubstantial as not to need further argument." Appellee then argues that: "If this Court were presented with an Obscene Matter Statute which did in fact withdraw the element of scienter, an entirely different question would be presented." (P. 3)

Appellant replies by saying that this Court is now presented with a statute which does "in fact withdraw the element of scienter."

Furthermore, in division 2 of the judgment appealed from the Georgia court held that the charge of having "possession of obscene matter"** "sufficiently charged the defendant with an offense." The Georgia Supreme Court held that it was not essential that it be alleged that it was "with intent to sell, expose or circulate the same."

Thus, the very serious and substantial question arises as to whether such *mere possession* of an article alleged to be obscene can be constitutionally punished. How can one know that an article is obscene without having first possessed it? After one possesses a book, a picture or a film, and reads, looks at it and views it, is it then that he learns that it is or is not obscene? If so, has he violated the Georgia law because he possessed it and discovered that it was obscene under contemporary community standards?

Counsel for the State of Georgia has invited the Court to view the films in order to ascertain they are "hard-core pornography." (P. 7) This illustrates that counsel for appellee concedes that he cannot make a determination of obscenity until he has viewed the film, and sug-

gests the Court do the same in order to ascertain that they are obscene.

The force of this argument suggests that *until they are viewed* no one can *know* that they are obscene. But the State of Georgia makes the *mere possession* a crime.

We suggest that any statute that makes *mere possession* of such material a crime places every person who buys a book in jeopardy of being prosecuted for committing a crime, if, after reading it he finds it to be obscene. This is so notwithstanding the element of scienter is present or not.

The substantiality of the question here involved is apparent on its face. It strikes at the very root and foundation of First Amendment freedom. To decide for oneself what one will read, what one will see and what one will hear must not be taken away. We are fully cognizant that films or books that might be offensive to others should not be forced upon them, but this is not involved in this appeal.

PENALIZING MERE POSSESSION

Beginning on page 7 of Appellee's motion is a list of various offenses that may constitutionally punish possession of certain prohibited items. These deal with stolen goods, burglary tools, liquor, weapons, forged checks, gambling devices and counterfeit money. Appellee contends that the States have the right to punish the *mere possession*. With this position we agree.

Appellee then contends that if the States can constitutionally punish the *mere possession* of these items, that it must necessarily follow that they can also constitu-

tionally punish the *mere possession* of obscenity. With this position we do not agree.

The items heretofore dealt with are not within the realm of the First Amendment's protection, and so the answer is that the *mere possession* of obscenity cannot be prohibited for the same reason that scienter cannot be constitutionally eliminated from obscenity prosecutions, even though it may be eliminated in the elements of other type offenses.

***Smith v. People of California*, 361 U.S. 147 (80 S.Ct. 215).**

Although *Roth v. United States*, 354 U.S. 476 holds that obscenity does not come within the protection of the First Amendment, it is to be noted that *Roth* was dealing with the *distribution* or *sale* of obscene books, and not with their *mere possession*. More recent decisions of this Court would indicate that the *Roth* rule might be inapplicable when applied to *mere possession*.

***Redrup v. New York; Austin v. Kentucky; Gent v. Arkansas*, 386 U.S. 767 (87 S.Ct. 1414).**

For example, *Roth* involved *distribution* of obscene material. The decision assumed that *Roth* was aware of the contents, and by the distribution of the material could not claim the protection of the First Amendment. This rule could very well be applied to the seller or distributor, for once ascertaining for himself that the matter is obscene he is on notice not to furnish it to others who might become offended. But *Roth* does not hold that the mere possessor of such material can be constitutionally punished. Nor does it hold that the mere possessor may not claim the First Amendment's

protection as to *his right to decide for himself* whether it offends him.

Thus, to extend the rule of *Roth* to a mere possessor would curtail the exchange of books, photographs and films because every man and woman would be in fear of buying such items because they would be in peril of being faced with a prosecution by the State if it should develop that the book or magazine they have bought turns out to be obscene, or the film they are viewing does not meet the standards of morality of their community.

If such article offends the possessor after he has determined for himself that it is offensive, he has two choices. First, he may destroy it, and second, he may keep it. But in either case the appellant contends the possessor comes within the protection of the First Amendment, and the rule of *Roth* is inapplicable to him.

INVALID SEARCH WARRANT

Beginning on page 12 of appellee's motion, appellee contends that *Marchetti v. U.S.*, 390 U.S. 39, says nothing with respect to search warrants issued for violation of the Wagering Tax Act. Appellee also cites several other cases dealing with retroactivity, and contends Marchetti is not applicable because it was decided 16 months later. Counsel has apparently not familiarized himself with the companion case of *Grosso v. United States*, 88 S.Ct. 709 (____ U.S. ____) holding as follows:

> "Petitioner has not, however, asserted a claim of privilege either as to the counts which charged willful failure to pay the occupational tax, or as to the allegation that he conspired to evade payment of the occupational tax. Given the decisions of this

Court in *Kahriger* and *Lewis*, supra, which were on the books at the time of petitioner's trial, and left untouched by *Albertson v. S.A.C.B.*, supra, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege."

The judgment of the Circuit Court was then reversed in its entirety.

In the case at bar, we raised the question of *Grosso* in the Supreme Court of Georgia prior to its judgment and raised the question of the invalidity of the search warrant before trial in Superior Court and again in the Georgia Supreme Court and on motion for rehearing.

Respectfully submitted,

WESLEY R. ASINOF
Attorney for Appellant
3424 First Nat. Bank Bldg.
Atlanta, Ga. 30303

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 293

ROBERT ELI STANLEY,

Appellant,

vs.

THE STATE OF GEORGIA,

Appellee.

BRIEF FOR APPELLANT ON THE MERITS

REPORT OF OPINION OF COURT BELOW

The opinion of the Georgia Supreme Court in this case is officially reported in 224 Ga. 259 and unofficially reported in 161 S.E.2d 309.

CONCISE STATEMENT OF GROUNDS OF THIS COURT'S JURISDICTION

This was a criminal proceeding brought by the State of Georgia charging the appellant with a felony, possessing obscene material in violation of Georgia Code 26-6301 as amended by an Act of the General Assembly of 1963, p. 78.

The judgment of affirmance by the Supreme Court of Georgia sought to be reviewed was dated April 9, 1968, and an order denying a rehearing was dated and filed April 22, 1968. The notice of appeal was filed in the Supreme Court of Georgia May 1, 1968, the appeal was docketed in the Supreme Court of the United States July 16, 1968, and probable jurisdiction was noted Oct. 14, 1968.

Jurisdiction of this appeal has been conferred on this court under and by virtue of 28 U.S.C.A. No. 1257 (2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularily describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

CRIMES – SALE, POSSESSION, ETC. OF OBSCENE MATTER.

Code § 26-6301 Amended.

No. 53 (House Bill No. 132).

An Act to amend Code Chapter 26-63, relating to obscene pictures and abusive and vulgar language, as amended, particularly by an Act approved March 17, 1956 (Ga. L. 1956, p. 801), so as to provide that any person who shall knowingly bring, or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print, any obscene matter

with intent to sell, expose, or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years; to provide that upon the recommendation of the jury, said offense may be punished as for a misdemeanor; to provide for definitions; to provide for severability; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Code Chapter 26-63, relating to obscene pictures and abusive and vulgar language, as amended, particularly by an Act approved March 17, 1956 (Ga. L. 1956, p. 801), is hereby amended by striking Code section 26-6301 in its entirety, and inserting in lieu thereof a new section 26-6301 to read as follows:

"26-6301. Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice, printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than

five years; provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i.e, a shameful or morbid interest in nudity, sex or excretion."

Section 2. In the event any section, subsection, sentence, clause or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses or phrases of this Act, which shall remain of full force and effect, as if the section, subsection, sentence, clause or phrase so declared or adjudged invalid or unconstitutional was not originally a part hereof. The General Assembly hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional.

Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 13, 1963.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Georgia Code section 26-6301 (Ga. Laws, 1963, p. 78), under which the appellant was convicted, is repugnant to the First and Fourteenth Amendments to the Constitution of the United States guaranteeing freedom of press and due process in that the statute removes the element of scienter from the definition of the offense of possessing obscene matter, and makes the mere possession of such matter a crime.

2. Whether a search warrant issued by a U. S. Commissioner authorizing a search of premises for bookmaking records and other wagering paraphernalia, founded on affidavits that the person whose home is sought to be searched has not registered as a gambler under the Wagering Tax Act, is invalid since the holding by this court in *Marchetti v. U. S.*, 390 U.S. 39 (88 S. Ct. 697) and *Grosso v. U.S.*, 390 U.S. 62 (88 S. Ct. 709).

3. Whether the Supreme Court of Georgia erred in holding and deciding that the search warrant and the search conducted thereunder were legal.

4. Whether a state officer, acting in concert with federal agents executing a federal search warrant issued for failure to register as a gambler, were constitutionally authorized to seize motion picture films concealed in a desk drawer of appellant's home on a claim by the state officer that the films were obscene where such search warrant did not describe the films to be seized and there was no prior adjudication that they were obscene.

5. Whether a state may constitutionally punish an individual for the mere possession of films alleged to be obscene where there is no evidence to show the appellant had prior knowledge that they were obscene, or that he had ever viewed them, or that he had permitted juveniles to view them, or that he was publishing them in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to them, or that he was "pandering" them.

CONCISE STATEMENT OF THE CASE

The appellant was indicted by the Fulton County Grand Jury for the offense of possessing obscene matter, to-wit: three reels of motion picture film. (A. 5)

Upon his arraignment he filed a general demurrer to the indictment on the ground that the Act was in conflict with the First and Fourteenth Amendments to the U. S. Constitution in removing the element of scienter from the definition of the offense. (A. 7) The trial court, after hearing argument of counsel, overruled the demurrer on all grounds. (A. 9)

Appellant also filed a special demurrer to that portion of the indictment which alleged that "accused should reasonably have known of the obscene nature of said matter," contending that it violated his First and Fourteenth Amendment rights by removing scienter from the offense. (A. 10) This demurrer was overruled by the court. (A. 12)

Appellant filed a motion to suppress the three reels of film from evidence (A. 13) on the grounds they were seized from his home by an Investigator of the Criminal Court "without a lawful search warrant particularly describing said articles to be seized," in violation of his Fourth and Fourteenth Amendment rights and that "no prior adjudication had been made that said articles were obscene" in violation of his First and Fourteenth Amendment rights.

Evidence was heard by the trial court on this motion, at which time the State introduced in evidence a federal search warrant and supporting affidavits issued for the violation of the Federal Wagering Tax Act. (A. 24, 57) After argument of counsel the motion was overruled. (A. 58)

The case proceeded to trial before a jury, and a verdict of guilty was returned and a sentence of one year imposed. (A. 60, 61)

The evidence for the State consisted of testimony by federal agents and one state officer that they searched the appellant's home pursuant to the federal search warrant for the seizure of wagering paraphernalia. They found no articles described in the warrant, but during the course of the search discovered three reels of "stag" film described in the indictment concealed in a desk drawer of one of the bedrooms. They found a motion picture projector and a screen, ran the film and determined in their opinion they were obscene. The films were then seized, the appellant was placed under arrest and the indictment and conviction followed.

The verdict of the jury was returned January 19, 1967, (A. 60) sentence pronounced January 19, 1967 (A. 61) motion for new trial filed the same day (A. iii) and overruled November 20, 1967. (A. iii)

Notice of appeal to the Supreme Court of Georgia was filed December 14, 1967 (A. 62). The appellant enumerated as error the overruling of the motion to suppress evidence, the overruling of the general demurrer to the indictment, the holding by the trial court in its rulings on the demurrers that the Act of the General Assembly under which the appellant was tried was constitutional and not in conflict with the First and Fourteenth Amendments to the United States Constitution; and that the evidence did not support the verdict in that the State failed to prove that appellant exhibited the alleged obscene films to any other person. (A. 64)

The unconstitutionality of the Act of 1963, p. 78, under which appellant was convicted, was first raised in the trial court by the 3rd ground of the general demurrer (A. 7) and the special demurrer (A. 10) and were

overruled by the trial court (A. 9 and 12), enumerated as error in the Georgia Supreme Court, (Grounds 2, 5, and 6, A. 64) passed on by the Georgia Supreme Court adversely to appellant in the 4th section of the opinion, (A. 69, 70 and 71) and motion for rehearing on this ground was made (A. 75 and 76, ground 3).

The invalidity of the search and seizure was first raised in the trial court by the motion to suppress prior to trial (A. 13), overruled by the trial court (A. 58), enumerated as error in the Georgia Supreme Court (A. 64) (Ground 1), and passed on by the Supreme Court of Georgia in Section 1 of the opinion (A. 66). A motion for rehearing of this ground was made. (A. 73, grounds 1 and 2).

The insufficiency of the evidence in failing to show that appellant had exhibited the films to an unwilling individual or a minor was raised in enumeration of error No. 8 in the Georgia Supreme Court, passed upon by that Court in Section 6 of its opinion (A. 71), and a motion for rehearing was made on this ground in paragraph 4. (A. 76).

SUMMARY OF ARGUMENT

1.

Georgia's Obscenity statute, in removing the element of scienter from the definition of the offense of Possessing Obscene Material, violates the First Amendment rights of an individual, in that it makes the mere possession of such matter a crime, without requiring any other act or intent to accompany the mere possession. The rule of *Roth v. United States*, 354 U.S. 476, holding obscenity

not to be protected by the First Amendment, is inapplicable to the *mere possession* of obscene material.

2.

The search warrant, under which the films in this case were seized by federal and state officers, was void because it was issued pursuant to the Wagering Tax Act, whereas this Court, in *Marchetti and Grosso v. United States,* 390 U.S. 39 and 390 U.S. 62, has declared such Act constitutionally unenforceable, thus rendering such search warrants issued pursuant thereto unenforceable.

3.

The Georgia Supreme Court held the search warrant in this case to be valid, even though the appellant, in his motion to suppress in the trial court, alleged the seizure of the films to have been "without a lawful warrant." This holding of the Georgia Supreme Court was error.

4.

The films were seized from the home of the appellant. There was no warrant *particularly describing* the films to be seized. There had been no prior adjudication that the films were obscene. Inasmuch as there was no warrant describing the films to be seized, or determining that they were obscene, the officers in using their own judgment violated the rule of *Marcus v. Search Warrants of Property,* 367 U.S. 717. The seizure of the films under these circumstances violated the appellant's Fourth and Fourteenth Amendment rights.

5.

There was no evidence of prior knowledge by the ap-

pellant that the films were obscene, and no charge made by the State in its indictment that appellant did more than possess them. There is no contention that the State is concerned with juveniles becoming contaminated by the films, no contention that persons who are unwilling to see the films will become exposed to them, and no contention of pandering. Therefore the conviction is contrary to *Redrup v. New York, Austin v. Kentucky* and *Gent v. Arkansas,* 386 U.S. 767.

THE ARGUMENT

1.

CONSTITUTIONALITY OF GEORGIA OBSCENITY LAW

The main question presented by this appeal involves the validity of the Georgia obscenity statute and whether it violates the First and Fourteenth Amendments in authorizing a conviction for mere possession of articles contended to be obscene in removing the element of scienter from the definition of the offense by punishing a possessor on less evidence than it takes to prove actual knowledge of its obscene nature.

The Georgia statute permits a conviction for possessing obscene articles *"if the defendant should reasonably have known of the obscene nature of said matter"* and thus deprives the accused of his liberty even though he has no actual knowledge that it is obscene. Such statute thus places every citizen in jeopardy of punishment by the State for possessing matter of which he may not have actual knowledge, or for believing, as he has a right to under the freedom of press clause of the First Amendment, that in his opinion it is not obscene.

Such statute thus deprives a citizen of the right given by the First Amendment to judge for himself, if he so chooses, as to what photographs, writings or books he may possess in the privacy of his own home.

In *Smith v. California,*

361 U.S. 147

this court held that an ordinance, dispensing with the element of scienter, in a prosecution of a bookseller for possession of obscene articles, was unconstitutional as in conflict with the First and Fourteenth Amendments.

It was recognized in *Smith* that in other types of offenses, such as food and drug legislation, "the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors — in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used." However, the distinction was made because "there is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." (P. 152-153.)

This Court held that "by dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter." (P. 153.)

If the State is prohibited, by the First and Fourteenth Amendments, from removing the element of *scienter* from the offense of selling or pandering obscene mate-

rial, and is thus prohibited from punishing a bookseller for selling an obscene book where such seller has no actual knowledge of its contents, may the States prescribe any less a standard against those who are not charged with pandering, selling or distributing, but merely possessing the same material? To put the matter in converse, are the States to be prohibited from convicting a seller who has no knowledge of the contents of the book he is selling, but may the same State convict such seller of *possessing* the same book, even though he was without the same knowledge?

The indictment in this case charges the appellant with knowingly possessing obscene matter. (A. _____) It further charges that he should reasonably have known of the obscene nature of said matter. If he has been called upon to defend his *actual* knowledge, that is one thing. If he has been called upon to defend that he *should reasonably have known* of the obscene nature of said matter, that is another. If the State is able, by some sort of proof, direct or circumstantial, to show that the appellant *should reasonably have known* of the obscene nature of said matter, such proof could be adduced far short of proving that he actually *did know*. This removed the element of *scienter*, and thus took from the appellant the constitutional protection of the First and Fourteenth Amendments.

It would be virtually impossible for any person to have actual knowledge that matter is obscene, nor could he reasonably be expected to have such knowledge, without having actually or constructively *possessed* such matter beforehand. For an individual to have knowledge of the contents of a reel of film, or to reach a determination *of his own* that it is obscene, he must learn

it by viewing the film, or by having been told by another that it is obscene. Thus, to learn firsthand it would be necessary that one *possess* the film in order to see it, and thus discover for himself his own opinion of its contents. To be required to accept the opinion of another that such film is obscene is to be deprived of the constitutional right to access of such picture, and thus be deprived of freedom of speech and press. Furthermore, the opinion of one man that a certain film is obscene may oftentimes not be shared by others. Consequently, in order for one to have knowledge of the contents of a film, or to make a determination for himself that it is obscene, necessarily requires that he possess it, and such possession has been made an offense under Georgia law.

Therefore, if A picks up a book at a newsstand or library, not knowing of its contents, he is in possession of it. If he reads it, in order to make a determination that it is actually constitutionally protected matter, and after reading it first ascertains that it is obscene, he has violated the Georgia law because he has possessed it at the time he *knows* it to be obscene. Such a law is obviously unconstitutional, and can not stand. If he should only have reasonably known of the obscene nature of said matter, instead of actually having such firsthand knowledge, the unconstitutionality of such statute is further removed by one more degree.

The State originally relied upon

Roth v. United States,

354 U.S. 476,

as authority for their proposition that obscenity does not come within the protection of the First Amendment.

However, *Roth* was dealing with the *distribution* or *sale* of obscenity; not with its *mere possession*. More recent decisions of this Court would indicate that the *Roth* rule might be inapplicable when applied to *mere possession*.

Redrup v. New York; Austin v. Kentucky; Gent v. Arkansas, 386 U.S. 767 (87 S.Ct. 1414.)

For example, *Roth* involved *distribution* of obscene material. The decision assumed that *Roth* was aware of the contents, and by the distribution of the material could not claim the protection of the First Amendment. This rule might very well be applied to the seller or distributor, for once ascertaining for himself that the matter is obscene he is on notice not to furnish it to others who might become offended. But *Roth* does not hold that the *mere possessor* of such material can be constitutionally punished. Nor does it hold that the *mere possessor* may not claim the First Amendment's protection as to *his right to decide for himself* whether it offends him.

Thus, to extend the rule of *Roth* to a *mere possessor* would curtail the exchange of books, photographs and films because every man and woman would be in fear of buying such items because they would be in peril of being prosecuted by the State if the book or magazine they have bought turns out to obscene, or the film they are viewing does not meet the standards of morality of their community.

If such article offends the possessor after he has determined for himself that it is offensive, he has two choices. First, he may destroy it, and second, he may keep it. But in either case the possessor could be pun-

ished under the Georgia statute as interpreted by the Georgia Supreme Court because he has already knowingly possessed it, knowing it to be obscene.

In the case at bar, the State has sought and is seeking, to deprive the appellant of his liberty upon the mere claim that he possessed, (apparently for his own use) three reels of film, contended by the State to be obscene, and that he either knew, or reasonably should have known, that they were obscene. No sale is alleged. No exhibition or attempted exhibition is alleged. No advertisement is alleged. No corruption of minors is alleged. No transportation is alleged. In fact, nothing is alleged to have been done by the appellant other than the fact that he did "*possess*" such matter.

The Georgia Supreme Court, however, has construed the Georgia statute to punish the *mere possession* of such articles, by holding:

> "It is not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was 'with intent to sell, expose or circulate the same'." (App. ___).

This statute, as interpreted by the Georgia Supreme Court, cannot be squared with the First Amendment because it places every citizen at his peril of standing convicted of a felony if, in his library or shelf of motion picture films should be found a book, magazine, photograph or moving picture film that may turn out to be pornographic.

2.

SEARCH WARRANT INVALID

At the time the search warrant was issued in this case, (App. ,) the Wagering Tax Act was being enforced under the authority of

United States v. Kahriger
345 U.S. 22,

and

Lewis v. United States,
348 U.S. 419,

holding the statute to be constitutional.

The warrant was issued by a U. S. Commissioner on the probable belief that a lottery or wagering operation was being carried on at the residence of the appellant, and that inasmuch as sworn evidence was presented that appellant *had not registered or paid his tax as purportedly required* by federal law, a warrant should issue to require the seizure of such implements of gambling as might be found in use there.

On the 7th day of September, 1966, the date the warrant was issued and executed, the federal wagering tax act was being enforced.

However, as of this date both *Kahriger* and *Lewis* have been specifically overruled by this Court.

On January 29, 1968, two weeks after the appellant filed his original brief and enumeration of errors in the Georgia Supreme Court in this case, in the case of

Marchetti v. United States,
390 U.S. 39 (88 S.Ct. 697)

and

Grosso v. United States,
390 U.S. 62 (88 S.Ct. 709)

this Court held:

"We conclude that nothing in the Court's opin-

ions in *Kahriger* and *Lewis* now suffices to preclude petitioner's assertion of the constitutional privilege as a defense to the indictments under which he was convicted. To this extent *Kahriger* and *Lewis* are overruled."

In *Grosso,* the unenforceability of the Wagering Tax Act against one who has even the remotest right to claim the Fifth Amendment privilege was so strongly recognized as an inherent defense to such a charge that even the *failure of the petitioner to assert the claim of privilege was held not to constitute a waiver of the privilege.*

If, in the instant case, the Agent had seized wagering material as a result of the execution of the search warrant, a conviction based thereon would have fallen for the same reasons as those urged in *Marchetti* and *Grosso,* on the theory that appellant would not have been required to criminate himself by registering.

If, applying this same analogy to the validity of the search warrant, the appellant had registered as a gambler and paid his tax, there never would have been federal grounds for the issuance of the search warrant because he would obviously not have violated the federal statute by conducting a wagering operation. Consequently, having the constitutional right to exercise his Fifth Amendment protection by not registering as a gambler bars that same failure to register from being the basis for which a search warrant (the commencement of a prosecution) might validly issue.

The search warrant was therefore void, the seizure of the films was illegal, the finding of the trial court that as a matter of law the warrant was valid and the holding of the Georgia Supreme Court in division one

of its opinion that the warrant and the search thereunder were legal, was erroneous under the Fourth and Fourteenth Amendments to the U. S. Constitution.

3.

GEORGIA COURT'S HOLDING THAT SEARCH WARRANT VALID AND THAT SEARCH WAS LAWFUL

The search and seizure question, while not an appealable question, is substantial and should be treated as a certiorariable question under 28 U.S.C.A. No. 2103.

Appellant, in his motion to suppress, alleged the films to have been seized *"without a lawful warrant."* (A. ____) The warrant was invalid under *Grosso & Marchetti* and should have been declared void by the Georgia Supreme Court.

4.

SEIZURE OF FILMS WITHOUT PRIOR ADJUDICATION OF OBSCENITY

Originally it was recognized by the Supreme Court of the United States in

Wolf v. People of State of Colorado, (1949),
338 U.S. 25,

that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable seizure."

In *Mapp v. Ohio,*
367 U.S. 643, (1961),

the Supreme Court overturned this theoretical principle of law, declaring that: "Since the Fourth Amend-

ment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government."

On the same day that *Mapp* was handed down by the Supreme Court the same principle was applied to the statutes of the State of Missouri as they authorized the search for and seizure of materials sought to be declared obscene.

In *Marcus v. Search Warrants of Property*, 367 U. S. 717,

the Supreme Court declared the Missouri statute to be in violation of the Due Process clause of the Fourteenth Amendment.

In *Marcus*, the appellants, owners of a newsstand where numerous books and periodicals had been seized by police officers under a warrant issued by a magistrate, moved to suppress the evidence because the procedures applied (1) "allowed a seizure by police officers 'without notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not these publications are obscene,' and (2) because they 'allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which magazines were obscene and were subject to seizure, impairing movants freedom of speech and publication'." The Supreme Court then determined that the question was "whether the use by Missouri in this case of the search and seizure power to suppress obscene publications involved abuses inimical to protected expression" and noted that the authority given to "police

officers under the warrants issued in this case, broadly to seize 'obscene publications,' poses problems not raised by the warrants to seize 'gambling implements' and 'all intoxicating liquors' involved in the cases cited by the Missouri Supreme Court." The Supreme Court, after applying the foregoing principles, held:

> "It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech."

In *Marcus,* the Supreme Court was dealing with even a stronger position insofar as the prosecution was concerned. In *Marcus,* a search warrant had been obtained in the language of the statute and the complaint authorizing the police officers to seize such magazines as in his view constituted "obscene publications." In the case at bar no warrant had been obtained authorizing even this broad seizing power.

In *Marcus,* there was in existence a State statute specifically authorizing the issuance of such a warrant, and prescribing the procedure therefor. Such a warrant was obtained. In the case at bar the officer executing the search of the appellant's home did not seize any matter or thing called for by the warrant, but made a decision, *ad hoc,* that the three reels of film were obscene, without benefit of any prior adjudication by a court or the Literature Commission.

The appellant recognizes that if an officer, executing a valid search warrant, discovers evidence of another and different crime or sees what is known to be contraband, he may make a seizure, even though the warrant does not *particularly describe* the article being seized. However,

as pointed out in the *Marcus* case, supra, the State court's "assimilation of obscene literature to gambling paraphernalia or other contraband for purposes of search and seizure does not therefore answer the appellants' constitutional claim, but merely restates the issue *whether obscenity may be treated in the same way.*" (Emphasis added.)

In quoting from *Speiser v. Randall*, 357 U.S. 513, the Supreme Court reiterated in *Marcus* that "The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for sensitive tools."

It is to be plainly noted in this case that the officer, after discovering three reels of film and making an inspection thereof, did not seek to enlist the aid of a qualified magistrate to make oath to him what he had seen, and to secure an adjudication by such magistrate that the films were obscene, so that at least the semblance of judicial authority would have been obtained so as to authorize the seizure of the films. Instead, the officer called the Solicitor General, whose duty it is to prosecute, and was advised to use "his own judgment" as to whether the films were obscene. (A.)

At what stage of the proceedings in this case did the films become obscene, so as to remove them from the constitutionally protected realm of the First Amendment, and place them in the unprotected area of "obscenity?" Were they obscene when the appellant first came into possession of them, if he ever did? Were they obscene when the officer first viewed them, or when he reported his findings to the Solicitor General? Did they become obscene when the Chairman and members of

the Literature Commission viewed them, or did they only become obscene when the jury in this case returned its verdict finding the appellant guilty of possessing obscene articles?

What is obscenity, and how has it been defined by the courts? Did the appellant know that it was obscene before he had himself viewed it? Was the appellant able to apply the same contemporary community standards as those who later testified at the trial in making his determination that the films were obscene? All these questions, and many more, come to mind in now trying to second guess whether the officer, in making such a determination, was applying the same standards and criteria as those applied by the appellant when the films were seized.

The appellant urges that inasmuch as such a thin line exists between obscenity and non-obscenity a mere ministerial officer of the law, engaged in the competitive enterprise of ferreting out crime, may not be authorized to substitute his judgment for that of the appellant and make a determination, on the spot, that the films found in the desk drawer of the appellant's home were to be classified as *obscene*.

The motion to suppress the films as evidence should have been sustained, and the holding by the Georgia Supreme Court that no question of freedom of speech or of the press is involved is error.

5.

NO EVIDENCE OF PRIOR KNOWLEDGE, THAT JUVENILES OR UNWILLING PERSONS VIEWED THEM OR OF PANDERING INVOLVED

On May 8, 1967, the United States Supreme Court

decided three different cases at one time. *Redrup v. State of New York, Austin v. Kentucky,* and *Gent v. State of Arkansas,* 386 U.S. 767, 87 S.Ct. 1414, Nos. 3, 16 and 50, October Term, 1966. All three cases involved selling and offering obscene literature. All three cases were reversed on First and Fourteenth Amendment grounds. In a per curiam decision, the Supreme Court held:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. * * * In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. * * * And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg v. United States,* 383 U.S. 463."

The record in the instant case reflects that there was no contention by the State that the appellant was doing any more than possessing the films, and there was a specific holding by the Georgia Supreme Court that *nothing* except possession need be alleged. There was no contention that the State was showing a concern for the morals of juveniles. There was no contention that the appellant was showing the films to persons unwilling to see them. There was no contention that he was pandering them.

It is unnecessary for the Court to review the evidence in the case to reach this question, for the State, by its very contention, seeks to punish the appellant for the *mere possession* of these films.

It is the constitutional right of every person in this country to have the freedom to choose what literature he desires to read or determine for himself what pic-

tures or films he desires to look at. To convict of *mere possession* is to deny a First Amendment freedom.

CONCLUSION

The statute under attack in this appeal violates the First and Fourteenth Amendments, the search warrant was void and the seizure of the films from the appellant's custody without a prior adjudication of obscenity or without specifically naming such films to be seized in a valid warrant was illegal, and the judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted,

WESLEY R. ASINOF
3424 First National Bank Bldg.
Atlanta, Georgia 30303
Attorney for Appellant

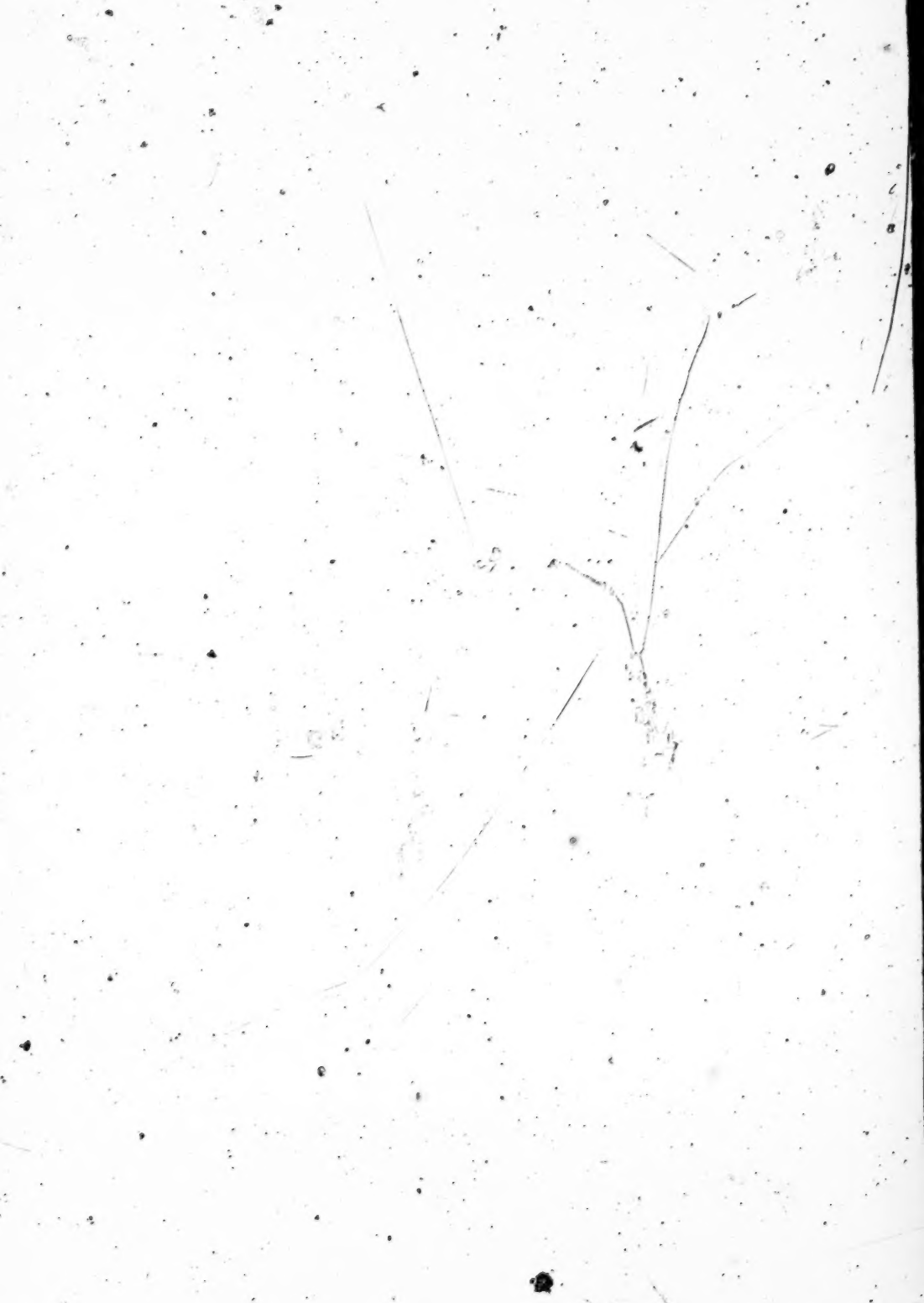
CERTIFICATE OF SERVICE

I do hereby certify that I as a member of the Bar of the Supreme Court of the United States, have this day mailed 3 copies of this brief by first-class prepaid mail to Lewis R. Slaton, Solicitor General, counsel for Appellee, care of Fulton County Courthouse, Atlanta, Georgia 30303.

This_____day of November, 1968.

_____

WESLEY R. ASINOF
Attorney for Appellant



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 293

ROBERT ELI STANLEY,

Appellant,

vs.

THE STATE OF GEORGIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR APPELLEE ON THE MERITS

OPINION OF COURT BELOW

Appellant's Brief on the merits correctly cites the opinion of the Supreme Court of Georgia, the Court below.

JURISDICTION OF THIS COURT

Appellee concedes that probable jurisdiction was noted by this Honorable Court on October 14, 1968 as

stated by Appellant, but most respectfully insists that Appellee's prior Motion to Dismiss the Appeal and to Affirm the Judgment was well-taken.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The citations by Appellant appear to cover the constitutional provisions and statutes involved in this case.

QUESTIONS PRESENTED FOR REVIEW

Counsel for the State of Georgia, Appellee, cannot agree with the wording of Questions 1, 2 and 5 as set out in Appellant's Brief (pages 5 and 6) because as worded the questions assume as true certain evidentiary facts and legal conclusions which are incorrect in part, are disputed by Appellee, and constitute the entire crux of this case. Being dissatisfied with these three questions as phrased by Appellant, we would restate them as follows, pursuant to Rule 40 (3) of this Court:

1. Whether Georgia Code Section 26-6301 (Ga. Laws 1963, p. 78), under which Appellant was convicted, removes the element of scienter from the definition of the offense of possession of obscene matter, by inclusion of the words, "if such person has knowledge or reasonably should know of the obscene nature of such matter," and whether such quoted words make said Code Section repugnant to the First and Fourteenth Amendments to the United States Constitution guaranteeing freedom of the press and due process.

2. Whether a valid search warrant issued by a U. S. Commissioner authorizing a search for book-

making records and other wagering paraphernalia *on September 7, 1966*, founded on affidavits showing sufficient probable cause for issuance of the search warrant and alleging that the person whose home is to be searched has not registered as a gambler under the Wagering Tax Act, is rendered *invalid retroactively* by the holding of this Court, *on January 29, 1968*, in *Marchetti v. United States*, 390 U.S. 39 (88 S.Ct. 697) and *Grosso v. United States*, 390 U.S. 62 (88 S.Ct. 709).

5. Whether the State may constitutionally punish Appellant for the *knowing* possession of motion picture films depicting sodomy, nudity and sexual intercourse, which constitute "hard-core pornography", where there was sufficient circumstantial evidence to authorize the trial jury to conclude that he knew of the obscene nature of said films and was preparing to exhibit them to a group of adult guests in his home, although there was no evidence to indicate that he had permitted juveniles to view them, or was "pandering" them to the general public.

Our objection to the way Question 5 was phrased by Appellant is his use of the words "mere possession" of films alleged to be obscene and the words "where there is no evidence to show" prior knowledge of Appellant of the obscene nature of the films, etc. We feel this is an unintentional distortion of both the evidence and the Georgia obscenity statute under attack.

We have no disagreement with Appellant's statement of Questions 3 and 4.

STATEMENT OF THE CASE

Counsel for Appellant has stated *the chronology* of proceedings in this case very accurately and we accept it as correct. However, he summarily disposed of all the evidence by one brief paragraph consisting of four sentences, with no citations whatever to either the Appendix or the Record (See Appellant's Brief, Page 8). To comprehend the whole context of this case, we feel it would benefit this Court to have a more detailed summary of the evidence upon which the Motion to Suppress Evidence was overruled, and upon which a traverse jury convicted this Appellant.

A. Evidence on the Motion to Suppress Evidence

Under a peculiarity of Georgia law, the burden is on the State to show that a search and seizure was lawful, once a motion to suppress is filed. Ga. Code Ann. 27-313 (2) (b). It was stipulated between the State and the defense that entry was made into Appellant's home on September 7, 1966 under authority of a search warrant issued by a United States Commissioner for the Northern District of Georgia upon affidavits by four named officers and that three cans of film, the subject matter of the indictment, were found in a drawer upstairs in the house by a U. S. Treasury Agent, in the presence of a State officer. The search warrant and affidavits were admitted into evidence without objection (State's Exhibit 1, A. 15-16).

The search warrant authorized the search of a two-story house at 280 Springdale Drive, Southeast, Atlanta, Georgia, for particularly described bookmaking records and money used in a wagering business operated in violation of Sections 4411, 4412, and 7203, Internal Rev-

enue Code of 1954 (State's Exhibit 1, A. 24-25). The Return shows that nothing was seized by the Federal officers except two Sports Journals and line sheets for August 1 to September 3, 1966 and for games for the week ending September 18, 1966 (A. 26).

Four very detailed affidavits by three Federal officers and one State officer (A. 29-57) set forth ample probable cause for belief that Appellant and one Jerry D. Paschall were then engaged in a bookmaking operation in Atlanta, Georgia. Appellant is identified as a prominent Atlanta lottery operator who has branched out into the bookmaking business. Appellant's two prior lottery arrests and his prior conviction and prison sentence for receiving stolen goods are set out (State's Ex. 1, A. 29). Detailed surveillances and confidential information over a six-month period linking Appellant, Paschall and another convicted bookmaker, Charles A. Thomas, are set out in the four affidavits which are some 28 printed pages in length (State's Ex. 1, A. 29-57). Since Appellant has never challenged the sufficiency of the probable cause affidavits, or of the federal search warrant itself, either in the Courts below or in his Brief before this Court, we feel it unnecessary to further summarize the search warrant and affidavits.

State officer George A. Carter testified that the three cans of 8 millimeter film were found in a desk in the upper bedroom of the home.

The officers used a movie projector in the upstairs living room, ran and observed the films, called the Solicitor of the Superior Court of Fulton County, and seized the films (A. 16-18). His assignment was lottery and bookmaking investigations when he accompanied the Federal officers (A. 20). When they arrived, Appel-

lant was alone inside the house but shortly thereafter two other men arrived (A. 21). The officers searched the bedroom where the films were found, and observed clothes with drycleaning tags bearing Appellant's name, mail addressed to Appellant and a tax notice for that address (A. 21). He went downstairs, advised Appellant that he had found obscene films upstairs and that he was under arrest. Appellant made no statement whatever about the film (A. 22). When they got ready to leave, Appellant went upstairs and got his coat out of that bedroom (A. 21). This substantially covers the evidence on the motion to suppress evidence.

The trial Court issued a written opinion and order overruling the motion to suppress (A. 58-59). The Court noted that the lawfulness and sufficiency of the Federal search warrant and affidavits were not attacked or questioned by the defense, and found as a matter of law that the search warrant was a valid one issued upon sufficient probable cause. The trial Court further held that the films were lawfully seized as contraband while in the process of effecting a lawful search under the Federal warrant, citing State and Federal decisions (A. 59).

B. Evidence in the Jury Trial

Special Agent William A. Pair, Intelligence Division, Internal Revenue Service, testified that at 6:00 p.m. on September 7, 1966, he, Special Agent Darrell Smith, and Investigator George Carter drove to Appellant's home with a Federal search warrant. Two men were standing beside a Ford parked behind Appellant's house named Joe Dean Stanley and Wallace. Appellant was inside the house and admitted Investigator Carter (A. 86-87). Mr. Pair identified himself, showed Appellant

the search warrant and advised him of his Constitutional rights, including his right to an attorney before being questioned. The two men in the yard, Joe Dean Stanley and Wallace entered the house and were seated in the living room. In the combination kitchen, dining room and bar, the table was set up for about eight persons (A. 88, 89, 90). Adjacent to the stove was a large pan of prepared biscuits, about three dozen (A. 91). Several visitors came to the house while the officers were there, a man named J. R. Kennedy, a lady named D. (Dee) Stanley, and two young ladies, (A. 90-91). All were well dressed (A. 91). The visitors were not allowed to enter (A. 91).

Federal Agent Darrell Smith found the three reels of film in a drawer of the desk in the master bedroom (A. 93-94), ran them in a projector found in the sitting room and saw they showed naked men and women having sexual relations and committing sodomy upon each other (A. 95-96). The desk had letters addressed to Appellant, stock brokerage forms bearing his name; the closet of the master bedroom had suits in it with Appellant's name on them (T. 96-97).

State Investigator Carter's testimony was substantially the same as upon the Motion to Suppress, with the following additions: the three films seized were shown in the Grand Jury Room on September 16, 1966, to a number of persons, all of whom signed their names to State's Exhibit 4 (A. 100). During the course of the search, he talked with Appellant's attorney, Mr. Wesley Asinof, (A. 101-102). He based his opinion as to the obscene nature of these films upon the actual contents of the films as he viewed them, showing sodomy and sexual intercourse (A. 102-103).

Special Agent Howard Farr, Internal Revenue Service, testified that he is a former professional photographer with five years experience (A. 104). He set up the projector and displayed the films on the date of the search. The three films are badly scratched and dirty. One roll was wound backwards, apparently never having been rewound after a showing of the film. He ran a few feet of that roll upside down on the screen. In his expert opinion, the films had "obviously" been shown before by someone (A. 105).

The films were admitted into evidence, without objection (A. 105), placed in a movie projector, and shown to the jury in a darkened courtroom.

To prove the elements of the Georgia obscenity statute, the following residents of Fulton County, Georgia, who had previously viewed the films in the pre-indictment showing, testified that they are familiar with the contemporary standards of their communities, and that the predominant appeal of these films is to a shameful and morbid interest in nudity and sex: Dr. James P. Westberry, pastor of the Morningside Baptist Church and also Chairman of the Georgia State Literature Commission since 1953 (A. 105-107); Thomas E. Price, service station operator in Northeast Atlanta (A. 109-110); Hinson McAuliffe, attorney and prosecutor of the Fulton County Criminal Court, living in Southwestern Atlanta (A. 111-112); Howard M. Hargis, retired locomotive engineer, living in Fairburn, Georgia, in the south end of Fulton County, Georgia (A. 112-114); C. Clayton Powell, optometrist, living in Southwest Atlanta (A. 114-115); J. R. Wilson, real estate business, living in Southwest Atlanta, but having his

place, of business in Northwest Atlanta (A. 116-117); Charles Stewart, Assistant Solicitor General, living in Southwest Fulton County (A. 118-119), and Investigator George Carter (A. 102).

In addition, Investigator Carter and Dr. Westberry each testified that there is no redeeming social value or importance whatsoever in those three films (A. 102; A. 108). We point out that two of these State's witnesses drawn as a cross-section of the Fulton County community are Negro citizens, i.e., Dr. Powell and Realtor Wilson.

Despite the defense contention throughout the trial that these films are not obscene (A. 108), the defense introduced no testimony of any kind to dispute the testimony of these State's witnesses as to the obscene nature of the films, which Dr. Westberry described as "the most obscene film or pictures I have seen in my life, the most obnoxious, nauseating, sickening, and foul and disgusting, it reaches as far as I am concerned in the entire 13 years, the lowest level that I can imagine" (A. 108).

The Appellant made a very brief unsworn statement to the jury in which he said he is a bachelor living alone and has a girl friend. He planned a Labor Day party, invited several couples out, and a friend (whom he did not identify) came by and gave him three rolls of film saying he wanted Appellant to see it. Appellant said he put the film in the desk drawer and had completely forgotten about it until informed by the officers that they were arresting him for it. Appellant said he never saw the film before today (when it was shown in the courtroom) and had never shown them to anyone (A.

119-120). Of course, the Appellant could not be cross-examined on his unsworn statement without his consent, under Georgia law.

SUMMARY OF ARGUMENT

I

The Georgia Obscenity Statute is not Unconstitutional

The words in the Georgia obscenity statute "if such person has knowledge or reasonably should know of the obscene nature of such matter . . . " do not withdraw the element of scienter from the statute. The Supreme Court of Georgia has flatly ruled to that effect in this same case in its opinion below, and this Court must, under its prior decisions, accept this construction of a State statute by the highest Court of that State.

Further, the Georgia statute is not unconstitutional because it prohibits and punishes possession of obscene matter, with knowledge of its obscene nature. If the material is obscene, it is not protected by the First Amendment to the United States Constitution and a State may lawfully prohibit its possession, declare it to be contraband, and punish one who knowingly possesses it. Unlike the bookseller prosecuted for *distributing* questionable books or magazines, the individual who knowingly *possesses* obscene matter is not circulating ideas to the public; therefore, freedom of speech and of the press is not involved.

The State has an interest in protecting the individual as well as the general public from lewd and lacivious pornography. The possession of obscenity can and often does lead the possessor to commit hideous crimes in-

spired by lust and passion; thus the State may legitimately punish the individual for possession with scienter of such obscene material.

II

The Films in this Case are Hard Core Pornography and are not Protected by the First Amendment; Therefore, It is not Necessary for this Court to Decide the Constitutionality of the Georgia Obscenity Statute.

The majority of this Court has consistently held that obscenity is not protected by the First Amendment. The Court should confine itself to the facts in this case, and go no further than is necessary to decide this one case. These films depict nothing but successive orgies by nude men and women engaging in repeated acts of seduction, sodomy and sexual intercourse. They are hard core pornography of the worst type. If this Court agrees with this appraisal of the films after viewing them, then they are obscene, they are unprotected by the First Amendment, and it is unnecessary for this Court to decide whether the "possession with scienter" portion of the Georgia obscenity statute is or is not constitutional.

This case was tried according to the exacting standards fixed by this Court in a series of opinions dealing with the obscenity question. No trial error whatever is urged by Appellant. The central question was "Are these films obscene and, if so, did the Appellant possess them with knowledge of their obscene matter?" The trial jury and the highest Court of the State have answered that question in the affirmative. If this Court agrees that the films are obscene, it need go no further. The cases relied upon

by Appellant are all distinguishable because they all deal with *literature* intended for dissemination to the public at large.

III

The Seizure of the Films Was Lawful.

The films were lawfully seized as contraband during a search for gambling paraphernalia under authority of a valid Federal search warrant. Appellant concedes that such a seizure can usually be lawfully made, even though the seized articles are not particularly described in the search warrant, but argues that this general rule does not apply to articles alleged to be obscene. We reply that the three films seized are so obviously hard core pornography that they were easily recognized as such by the seizing officers, who did not have to read and evaluate *books or magazines*, as in the cases cited by Appellant, to make their own judgment as to obscenity. Once again the key to the lawfulness of the seizure is the unmistakable obscenity of the films.

IV

Valid Federal Search Warrants Issued and Executed in 1966 are not Rendered Invalid by the 1968 Decisions of this Court in Federal Wagering Tax Cases.

This Court's opinions in *Marchetti v. United States*, 390 U.S. 39 (88 S.Ct. 697) and *Grosso v. United States*, 390 U.S. 62 (88 S.Ct. 709) were very narrow ones. They held only that a defendant in a Federal criminal case charged with failing to register as a gambler and pay the occupational and excise taxes can assert at trial his Fifth Amendment privilege against self-incrimination (because if he *had* registered and paid the Federal taxes, he

could be prosecuted by the States under their anti-gambling statutes). Nothing in those cases holds that prior valid Federal search warrants are *retroactively* rendered invalid now. Those two cases do not even hold that Federal search warrants cannot be lawfully issued *now* to seize wagering paraphernalia.

The extent of the *Marchetti* and *Grosso* decisions is still under consideration by this Court. In no way, however, can they be construed as operating retroactively to invalidate formerly valid search warrants issued sixteen months prior to those decisions. We urge this Court to continue to refuse to give retroactive effect to new decisions which overrule its own prior decisions, as this Court has done in the past.

The seizure of the three pornographic films as contraband was completely lawful, being effected as an incident of a lawful search being conducted under authority of a valid Federal search warrant issued upon affidavits showing ample probable cause.

The judgment of the Supreme Court of Georgia should be affirmed, or, alternatively, Appellee's Motion to Dismiss Appeal should be granted upon a finding that probable jurisdiction was improvidently noted.

ARGUMENT

This whole case hinges on only two basic questions, (1) the constitutionality of the Georgia obscenity statute and (2) the lawfulness of the seizure of the pornographic films in Appellant's home. As presented by Appellant, his Questions 1 and 5 attack the constitutionality of the Georgia obscenity statute and his Questions 2, 3, and 4 complain that the seizure of the films

was unlawful. However, in his Argument section, his citations and argument are interwoven back and forth between his five questions in such a manner as to make it difficult to answer without constant repetition.

We think Appellee can present a clearer argument by discarding Appellant's five question format and dividing this portion of the Brief into two main sections, to wit, constitutionality of the statute and lawfulness of the seizure. We will attempt to answer all points raised by Appellant in his five questions, however.

I. GEORGIA OBSCENITY STATUTE IS NOT UNCONSTITUTIONAL

(A) The Georgia Obscenity Law does not Withdraw the Element of Scienter.

Appellant bases virtually his entire argument upon the following clause in the Georgia obscenity statute, . . . "shall, if such person has knowledge or *reasonably should know of the obscene nature* of such matter, be guilty of a felony. . . . " (See the entire statute, Appellant's Brief, Pages 4, 5). He urges upon this Court his contention that the foregoing (italicized) words withdraw scienter from the statute, making it possible to convict an otherwise innocent possessor of an obscene book which he has not read and does not know to be obscene (Appellant's Brief, page 13). This argument completely ignores the words " . . . if such person has knowledge" and also another clause in the same statute saying in part "Any person . . . who shall *knowingly* have possession of . . ." This last quoted clause of the Georgia statute is the exact clause under which Appellant was convicted. It must be noted that the statute

penalizes *knowing* possession of obscene matter and then repeats much further on, as a kind of catch-all covering all the various types of obscenity violations contained therein of selling, offering to sell, lending, giving away, transmitting, advertising, manufacturing, printing and possession of obscene matter, the scienter requirement "if such person has knowedge." Thus, the scienter element is present twice in the same statute, once actually incorporated in the definition of the "possession" offense of which Appellant stands convicted. Thus we submit that scienter is clearly made an element of the offense.

We turn now to the words "or reasonably should know of" the obscene nature of such matter. Appellant argues that this language withdraws scienter from the statute (Appellant's Brief, Pages 11-14).

Here we most respectfully point out that where language of a State statute is ambiguous, vague, or capable of being interpreted several different ways, this Honorable Court *must* accept the construction placed upon the ambiguous language by the highest Court of that State. In the 1958 case of *Kingsley International Pictures Corp. v. Regents of the University of the State of New York,* 360 U.S. 684, 688 (79 S.Ct. 1362). Mr. Justice Stewart, speaking for the Court, said, in pertinent part:

> ". . . We accept too, *as we must,* the construction of the New York Legislature's language which the Court of Appeals has put upon it." (Italics added).

In the more recent case of *Cramp v. Board of Public Instruction of Orange County,* 368 U.S. 278 (1961), (82 S.Ct. 275), Mr. Justice Stewart said again, speaking for the Court, in pertinent part:

"The Florida Supreme Court first considered the

> provisions of this legislative oath in *State v. Diez*, 97 So. 2d 105, a case involving the validity of an indictment for perjury. There the Court upheld the constitutionality of the legislation only upon finding it . . . 'inherent in the law that when one takes the oath that he has not lent aid, advice, counsel and the like to the Communist Party, he is representing under oath that he has not done so knowingly.' 97 So. 2d at 110. In the present case the Florida Court adhered to this construction of the statute, characterizing what had been said in *Diez* as a ruling that *'the element of scienter was implicit in each of the requirements of the statute'*. 125 So. 2d, at 557. *We accept without question this view of the statute's meaning, as of course we must. This authoritative interpretation by the Florida Supreme Court 'puts these words in the statute as definitely as if it had been so amended by the legislature'. Winters v. New York*, 333 U.S. 507, 514." (Italics added).

For other cases holding that this Court *must* accept an authoritative interpretation of a State statute by the highest Court of that State, or defer to that State Court for an interpretation, see *Albertson v. Mallard*, 345 U.S. 242, at 245 (1952), (73 S.Ct. 600); *United States v. Burnison*, 339 U.S. 87, at 89 (1949), (70 S.Ct. 503); and *Aero Transit Co. v. Commissioners*, 332 U.S. 495, at 498 (1947), (68 S.Ct. 167). In the last cited case, Mr. Justice Rutledge, speaking for a unanimous Court, said in pertinent part (332 U.S. at 498):

> ". . . The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to State statutes by State courts."

With this foregoing principle firmly established by

this Honorable Court, we point out that the Supreme Court of Georgia has held unanimously *in this same case* that the words "or reasonably should know" *do not withdraw the element of scienter from the definition of the offense of possessing obscene matter.* In *Stanley v. State,* 224 Ga. 259, 161 S.E. 2d 309, Mr. Justice Frankum said, in pertinent part, at page 260:

> "Defendant contended in the third ground of his general demurrer to the indictment that the law under which he was indicted is unconstitutional, null and void as in conflict with the first and fourteenth Amendments to the Constitution of the United States guaranteeing freedom of the press and due process of law in *that it seeks to punish persons charged with the violation of the law if they reasonably should know* of the obscene nature of such matter, *it being contended that the requirement of reasonable knowledge would withdraw the element of scienter from the definition of the offense and would render a person guilty without actual knowledge of the obscene nature of the matter. This contention is without merit.* As we construe the statute the language *'if such person has knowledge or reasonably should know of the obscene nature of such matter'* merely amounts to a statutory expression of a rule of evidence which has been extant in this State over many years. Whether a person has knowledge of a fact is a matter peculiarly within the mind of such person, and it is rarely if ever that the defendant's guilty knowledge is susceptible of direct proof. For this reason this Court has adhered to the principle that guilty knowledge may be shown by circumstances as well as by actual and direct proof. . . . The statute is therefore not unconstitutional for any of the reasons urged, and the trial Court did not err in overruling the general and special demurrers of the

defendant in which he sought to raise this issue." (Italics added).

Thus the Supreme Court of Georgia has flatly and directly rejected Appellant's contention that scienter has been withdrawn from this obscenity statute, by interpreting the exact words of that statute which Appellant is now repeatedly attacking in his Brief as withdrawing the element of scienter. Under the rule of *Kingsley Pictures Corp., Cramp, Winters, Albertson, Burnison* and *Aero Transit*, all supra, we do not feel that this Honorable Court can review or reverse the interpretation placed upon this statute by the highest Court of Georgia, unless this Court summarily overrules all of its prior decisions just cited. No good reason appears for this Court to take such drastic action.

We wish to point out that this interpretation of the words "or reasonably should know" as merely a statutory expression of a Georgia rule of evidence is deeply imbedded in Georgia case law and is not one newly created by the Supreme Court of Georgia expressly for the purpose of upholding this statute or of affirming the conviction in this case. In 1903, in *Rivers v. State,* 118 Ga. 42, 44 S.E. 859, a unanimous Georgia Supreme Court held:

> "Where the knowledge or intent with which an act is done constitutes an element of a criminal offense, it is ordinarily impossible to prove the actual mental state of the defendant, *the prosecution being only required to show the ability and opportunity to know.*" (Italics added).

Also, in *Birdsong v. State,* 120 Ga. 850, 48 S.E. 329, the Supreme Court said, in 1904:

"On the trial of one indicted for receiving stolen

> goods, it is not error to charge, in effect, that guilty knowledge is essential to a conviction of the accused, but that *such knowledge may be inferred from circumstances which would*, in the opinion of the jury, *lead a reasonable man to believe that the goods were stolen.*" (Italics added).

Appellant's chief reliance is upon *Smith v. California*, 361 U.S. 147 (80 S.Ct. 215). Such strong reliance is clearly misplaced, for *Smith* is distinguishable from the instant case in two major particulars, to wit: (1) *Smith* involved the charge of possession of an obscene book by a bookstore proprietor, whereas the instant case involves possession of a "stag" movie film (so characterized by Appellant himself — Brief, Page 8) which is so clearly "hard core pornography" as to be unprotected by the First Amendment and (2) the city ordinance in *Smith* "imposed a strict or absolute criminal liability on Appellant not to have obscene books in his store" (361 U.S. at 150) and the *definition* of the offense and *its construction by the California courts* include "no element of scienter — knowledge by Appellant of the contents of the book" (361 U.S. at 149), whereas in the instant case the definition in the Georgia statute contains the essential words "knowingly", "know", or "knowledge", which require proof of scienter, no less than *nine times*, and the Supreme Court of Georgia has construed the statute in this same case as *not* withdrawing the element of scienter. Thus *Smith*, supra, has utterly no significance in this case, except as a convenient vehicle for argument by Appellant.

Finally, we point out that in a very recent decision of this Court, *Ginsberg v. New York*, 390 U.S. 629 (88 S.Ct. 1274), (1968), an attack upon the scienter pro-

vision of the New York obscenity statute was rejected by this Court. The New York statute defined "knowingly" as "having general knowledge of, *or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, or both*" (390 U.S. 643, 646. Italics added). This Court affirmed the conviction in *Ginsberg*.

The foregoing italized words from the New York statute are very similar in meaning to the words in the Georgia obscenity statute, "or reasonably should know." Thus we submit that the overwhelming weight of authority shows conclusively that scienter is not withdrawn from Georgia's statute by the last-quoted words.

These films, which we respectfully urge this Court to view *in camera* prior to oral argument, are not literature in any sense of the word. They contain no plot, no dialogue, no moral lesson, no insight into contemporary social customs or mores, or any other redeeming social value. They are not designed — on 8 millimeter film — for public exhibition in motion picture theatres, but only for lustful private showings at exorbitant rental or purchase prices. They consist of nothing except close-up scenes of seduction, display of male and female gentillia and pubic regions, oral sodomy, and sexual intercourse in a variety of positions. Thus we feel that the films are pure obscenity. This Court said in *Roth v. United States*, 354 U.S. 476 (1956), (77 S.Ct. 1304):

> "We hold that obscenity is not within the areas of constitutionally protected speech or press." (354 U.S. at 485).

The films are also "hard core" pornography as dis-

cussed by Mr. Justice Harlan (dissenting opinion, *Roth*, supra, at 507, 508) and by Mr. Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184 (84 S.Ct. 1676) (concurring opinion). Therefore, counsel for Appellee earnestly insist that these filthy motion pictures are neither "speech" nor "press" as contemplated by the First Amendment and as dealt with by this Honorable Court in a long line of decisions beginning with *Roth*, supra.

Therefore, while we of course respectfully defer to this Honorable Court's noting of probable jurisdiction in this case, we also respectfully insist that our Motion to Dismiss the Appeal or alternatively, to Affirm the Judgment Below was meritorious, in view of the interpretation by the Supreme Court of Georgia on the question of scienter, which this Court is bound to accept, by its own precedents. We respectfully suggest that, either prior to oral argument or thereafter, this Court may wish to reconsider and dismiss this appeal by entry of an order that probable jurisdiction was improvidently noted.

(B) The Georgia Obscenity Statute is not Unconstitutional Because It Makes Knowing Possession of Obscene Matter an Offense.

This is the second prong of Appellant's attack upon the constitutionality of the Georgia Obscenity Statute. He argues continuously in his Brief that one may not constitutionally be punished for "mere possession" of obscene matter. However, he intertwines with this argument his thesis that the Georgia statute dispenses with all scienter and therefore a person can be convicted in Georgia upon *bare possession* alone. We think we have adequately shown the fallacy of this argument in the

preceding section of this Brief. Scienter *is* an element of this offense.

Therefore, we think the second aspect of the constitutionality of the statute is whether Georgia may punish a citizen for *possession* of obscene matter, *knowing of its obscene nature,* without including the additional elements of exhibiting, selling, lending, printing, manufacturing, offering for sale, etc., of such obscene matter. In other words, is a statute imposing criminal sanctions upon the mere possession of obscene matter, *knowing of its obscene nature,* constitutional? The Supreme Court of Georgia has said that it is in the instant case, saying in part:

> "It is not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was with intent to sell, expose or circulate the same." *Stanley v. State,* 224 Ga. at 261.

In other words, it is undisputed by Appellee that one of the numerous types of obscenity violations contained in the Georgia statute penalizes the possession of obscene matter, with knowledge of its obscene nature, and that the Appellant Stanley was convicted under the portion of the statute reading, "or who shall knowingly have possession of" (See Indictment A. 5, 6).

This appears to be a case of first impression in this Honorable Court on this exact point. In none of the decisions in the obscenity field that counsel for Appellee have studied have we been able to find a ruling by this Honorable Court on the precise question, "May possession alone of obscene matter, *with scienter* on the part of the possessor, be constitutionally punished by the

States?" Neither has Appellant cited any case in point. The closest approach to this point is *Smith v. California,* supra, where the appellant was convicted of bare possession alone, *without* scienter. This Court reversed that conviction, of course, but solely on the "absolute criminal responsibility . . . without any element of scienter" feature of the city ordinance (361 U.S. at 150). This Court did *not* say in *Smith,* supra, that *possession* of obscene matter *plus scienter* could not be constitutionally punished. In fact, the majority of this Court, speaking through Mr. Justice Brennan seemed to *imply* that a bookseller who has knowledge of the obscene nature of the books he stocks *may* be punished for such knowing possessing alone, by the following language (361 U.S. at 154):

> "We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pount, The Role of the Will in Law, 68 Harv.L. Rev. 1. Cf. *American Communications Assn. v. Douds,* 339 U.S. 382, 411. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.
>
> We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller *for carrying an obscene book in stock;* whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the bur-

den of explaining why he did not, and what such circumstances might be." (Italics added).

The foregoing language certainly suggests that if the city ordinance in *Smith* had contained the element of scienter, and if the prosecution had proved the defendant's awareness of the contents of the book in question, he could have been constitutionally convicted of its possession, or as the Court puts it, "for carrying an obscene book in stock". The Los Angeles ordinance prohibited possession alone and contained no additional elements such as intent to sell or distribute (361 U.S. at 148). This construction of the Court's opinion in *Smith* seems further strengthened by the concurring opinion of Mr. Justice Black in the same case where he says, in part, "The Court's opinion correctly points out how little extra burden will be imposed on prosecutors by requiring proof that a bookseller was aware of a book's contents *when he possessed it*" (361 U.S. at 156. Italics added).

This Court closely approached the question at issue in *Mishkin v. New York,* 383 U.S. 502 (86 S.Ct. 958) (1966), when it affirmed the conviction of a defendant for possession of obscene books, with intent to sell them. Incidently, in this case this Court once again held that scienter was an element of the New York statute because the New York Court of Appeals had so interpreted it in *People v. Finklestein,* 9 N.Y. 2d 342, 214 N.Y. S.2d 363, 174 N.E. 2d 470 (1961) saying that appellant's challenge to the validity of the statute, based on *Smith,* "is thus foreclosed" (383 U.S. at 510). We again submit that the question of scienter is equally foreclosed in this case.

The statute in the *Mishkin* case, supra, of course, con-

tains one additional element missing in the Georgia obscene matter "possession" clause, i.e., the intent to sell the obscene book.

We conscientiously take the position that, in the limited area of "hard core pornograph", as distinguished from literary or pictorial publications such as nudist magazines, "girlie" magazines, novels and other books dealing extensively with sex, and movies whose plots are based in large part on adultery, homosexuality and the like, which are on the questionable "borderline" of obscenity, the State may prohibit an individual from possessing *obscene* matter as defined by this Court, if he knows of the obscene nature of such matter and may further punish him if he does so. Our reasoning goes like this: in *Roth,* supra, this Court held that "obscenity is not within the area of constitutionally protected speech or press." (354 U.S. at 485). This Court then set out in *Roth* the test for obscenity (See 354 U.S. at 487, note 20). The Georgia statute, enacted in 1963 and after *Roth,* follows this approved definition almost to the letter.

This Court reiterated in *Ginsberg v. New York,* supra, that "obscenity is not protected expression" (390 U.S. at 641). The Court said further in *Ginsberg,* supra, that "the State also has an independent interest in the well-being of its youth" (390 U.S. at 640), thus reiterating its comment in *Prince v. Massachusetts,* 31 U.S. 158 (64 S.Ct. 438), at 165, that the State has an interest "to protect the welfare of children". We submit that this Court should go one step further and declare that the State has an interest to protect the well-being of its adult citizens as well as that of its minors.

There are numerous examples of the States and the Federal Government protecting *the citizen* against *his own acts,* as contrasted with protecting society against the acts of *a citizen.* An interesting analogy is the almost universal criminal sanctions against gambling. This Court noted in *Marchetti v. United States,* 390 U.S. 39, at 44 (88 S.Ct. 697) that "State and local enactments are more comprehensive. The laws of every State, except Nevada, include broad prohibitions against gambling, wagering, and associated activities." Georgia, for example, makes it a misdemeanor for any person to "play and bet for money or other thing of value at any game played with cards, dice or balls . . . or at any table for gaming . . . or at any billiard or pool table" (Ga. Code Ann. 26-6404).

One taking Appellant's view could well argue that it is unconstitutional to prohibit an adult citizen from doing what he wants to with his own money. He works for and earns his monthly pay check. If he wants to squander it all in one poker game, the State should have no power to prevent him from doing so, or punish him if he does so. Thus the argument could go. However, we know of no case in which this Court has struck down a State statute penalizing a citizen for gambling with his own money.

(C) Many State and Federal Statutes Prohibit and Punish Mere Knowing Possession of Contraband.

We will simply point out here a few of the multitude of crimes punishable by State statutes for mere *knowing possession* of property declared by law to be contraband, to wit: *possession of* stolen goods, burglary tools, non-tax-paid whiskey, concealed weapons (unlicensed),

forged checks, gaming tables and gambling paraphernalia, slot machines, whiskey stills or apparatus, narcotics, dangerous drugs and illegal firearms, such as machine guns.

Turning to Federal statutes, *knowing possession* under certain circumstances of narcotics, certain drugs such as amphetamines and barbiturates, unlicensed whiskey stills, non-tax-paid whiskey, stolen property transported interstate or stolen from interstate shipments, counterfeit U.S. currency or apparatus, badges or identification cards of a United States Agency, plates for the printing of U.S. passports, stolen mail matter, money taken in a robbery of an F.D.I.C. insured bank, etc., are all punishable by federal imprisonment.

The foregoing "possession crimes" are only illustrative and by no means comprehensive of *all* the State and Federal statutes which punish unlawful and knowing possession of contraband.

Assuming that *obscenity* is not protected by the First Amendment, as this Court held earlier this year in *Ginsberg*, supra, why may a State not declare obscene matter to be contraband and punish its knowing possession by anyone, minor or adult? Is a State constitutionally authorized to protect the *body* of a citizen, by prohibiting by criminal sanctions his possession of things which will harm his body and injure his health – narcotics, intoxicating liquor, dangerous drugs, etc., but constitutionally prohibited from protecting his *mind* by making his possession of filth a crime? We answer the last question in the negative, because in prohibiting the citizen's possession of obscene matter the State is also

inhibiting him from the likely and probable consequences of such possession.

The viewing of films similar to those in the instant case will certainly arouse in certain types of human minds the most violent and depraved sexual urges. After viewing such wanton scenes of sex and sodomy, the viewer may well be aroused to such a pitch of sexual passion that he must satiate it at any cost. Rape, murder, mutilation and sodomy (either voluntary or procured by force) perpetrated upon the helpless public follow in many cases.

Then too, a mere "possession, with scienter," statute is necessary for suppression of "hard-core pornography" in many cases because of evidentiary problems. Take the instant case, for example. Appellant may have been the actual owner of the films and may have been renting or showing them extensively throughout this community, for all we know. They certainly had seen extensive use, as evidenced by their dirty, scratched condition. But, absent a confession from Appellant — and persons of his criminal background rarely admit anything — the State could not prove this. Unless a possessor of "hard-core pornography" is caught red-handed while actually exhibiting it to an audience, or with such a quantity of it in his possession that a clear inference arises that he intends to sell, circulate and distribute it to the general public or to some segment thereof, or under circumstances where it is clearly being offered for sale, *knowing possession* of the obscene matter is all that the State can prove.

In such cases, by having a criminal statute penalizing "knowing possession", however, the State can halt the

obviously contemplated, though legally unprovable, dissemination of the pornography to the public at its source, and punish the possessor. Thus, such a statute in its long-range effect protects the public from uncontrolled and unforeseeable use of the pornographic material by its possessor.

(D) This Honorable Court Should Rule Squarely on the Obscene Nature of the Films Involved in This Case.

Appellant relies heavily upon the three cases jointly decided in *Redrup v. New York,* 386 U.S. 767 (87 S.Ct. 1414). (Brief, page 15). In those cases, all of which involved distribution of *magazines on sale at newsstands* — which completely distinguishes them factually from this case — this Court originally limited review to the issue as to proof of scienter in two cases (*Redrup v. New York,* 384 U.S. 916 and *Austin v. Kentucky,* 384 U.S. 916) and to constitutionality of an Arkansas anti-obscenity statute (*Gent v. Arkansas,* 384 U.S. 937) in light of the doctrines of "vagueness" and "prior restraint." Thus, as forcefully pointed out by Justices Harlan and Clark (dissenting opinion, 386 U.S. 771), the permissibility of the State determinations of obscenity of the publications *was laid aside.* Yet, the Court ruled that the materials could not be constitutionally adjudged obscene (Harlan, J., dissenting opinion, 386 U.S. at 772).

We therefore most respectfully urge this Honorable Court *to rule directly upon the obscenity* of these three films. If they are obscene, they are not protected by the First Amendment and therefore this Court does not have to rule on the broader constitutional question as

to whether the "knowing possession" portion of the Georgia obscenity statute violates First Amendment rights. A simple factual finding of *obscenity* can eliminate the constitutional question completely.

It is a fundamental policy of this Court that it will limit its decision to the facts before it and to the validity of the statute in question as applied to the facts (see concurring opinion of Mr. Chief Justice Warren, in *Roth*, supra, 354 U.S. at 494).

(E) The Evidence Was Sufficient to Support a Findings of Scienter and of an Intent to Display Obscene Films to Adult Guests.

Appellant in his Question 5 poses the question of the constitutionality of a conviction for "mere possession" of films where there is "no evidence" that Appellant knew them to be obscene, had ever viewed them or permitted juveniles to view them, was publishing them so obtrusively as to make it impossible for an unwilling person to avoid exposure to them or was pandering them (Appellant's Brief, page 6).

Yet Appellant says on page 24 of his brief that "it is unnecessary for the Court to review the evidence." We have set out the evidence in our Statement and will not unnecessarily rehash it. However, we earnestly insist that *circumstantially* there *was* enough evidence to show Appellant's knowledge of the obscene nature of the films. After conviction, the evidence must be considered in the light most favorable to the prosecution, which must be given the benefit of all inferences reasonably to be drawn from the evidence. *Morton v. United States*, D.C. Cir., 1945, 147 F.2d 28, cert. den. 324 U.S. 875; *Arena v. United States*, 9 Cir., 1955, 226 F.2d 227, cert.

den. 350 U.S. 954; *Bianchi v. United States*, 8 Cir., 1955, 219 F.2d 182, cert. den. 349 U.S. 915; *Fields v. United States*, 4 Cir., 1955, 228 F.2d 544, cert. den. 350 U.S. 982.

Thus the State showed that the films in question were concealed in a drawer of the Appellant's desk in his master bedroom and were not with the other innocuous films and projector in the upstairs living room. One of the cans of films bears the home-made and suggestive label "Young Blood" (See can itself or description in Indictment, A. 5). When the officers arrived, two men were in Appellant's backyard. While the search was in progress, another man and three women arrived at Appellant's home. A table was set for eight and three dozen biscuits were ready for cooking. This added up to a total of seven persons, four men and three women, including Appellant, at his home that night (apparently one woman was tipped off that the party was off because of the presence of the officers and did not make her appearance.) The film was scratched, dirty and one reel was wound backwards, indicating recent viewing. Appellant made no comment whatever when told he was under arrest for the obscene film found upstairs. While his exercise of his constitutional right to remain silent cannot be used against him, surprise, protest or disclaimer of any knowledge of the nature of the films would seem a more natural reaction, if he had never viewed them before and did not know they were obscene.

Then, his unsworn statement, together with reasonable inferences drawn therefrom, would support a finding that after he planned his Labor Day party and invited several couples, someone (he said a friend — whom

he did not identify) brought the films by with the suggestion that he view them. The obvious inference is that they were to be shown at the party, to four couples, including himself. It is further a reasonable inference that he either would have viewed them himself prior to the party, or would have been informed by his generous "friend" of the general nature of the films. In either case, scienter would be present.

We point this out only because Appellant's Question 5 leaves the impression that nothing was proved except that Appellant had the films in his possession. *The sufficiency of the evidence is not an issue before this Court,* as Appellant virtually concedes on page 24 of his Brief where he says there is no necessity for the Court to consider the evidence in this case. We note, however, that the Supreme Court of Georgia in Division 6 of its opinion held that "the evidence authorized the verdict" (A. 71).

(F) The Georgia Obscenity Statute Is in Accord with Landmark Decisions of this Court; the Trial was Conducted in Accordance with Standards Set by this Court.

As previously pointed out, the Georgia obscenity statute tracks the definition of obscenity given in the *Roth* case, supra (Appellant's Brief, pages 4 and 5). The trial court charged, word for word, the approved charge in *Roth* (354 U.S. at 490). See charge of the Fulton Superior Court at A. 122. The State proved, by witnesses comprising a cross-section of the community, that the predominant appeal of these films was to a prurient interest, i.e. a shameful and morbid interest in nudity and sex, when considered as a whole and applying contemporary community standards. The State also proved

the additional element of obscenity, clearly defined by this Court for the first time in *Jacobellis v. Ohio*, supra, that the films were "utterly without redeeming social importance". We respectfully submit that counsel for the State of Georgia tried in this case to comply with what he conceived the law of obscenity to be, as interpreted by this Court. No trial errors whatever are asserted by Appellant.

With the greatest respect and deference to this Honorable Court, we point out even the members of this Court are in sharp disagreement on numerous aspects of the obscenity problem. Mr. Justice Harlan, dissenting in *A Book etc. v. Attorney General of Massachusetts* (better known as the "Fanny Hill" case), 383 U.S. 413 (86 S.Ct. 975) said in 1966 that the central development from the aftermath of the *Roth* case is "that no stable approach to the obscenity problem has yet been devised by this Court" (383 U.S. at 455). Mr. Justice Stewart said in *Jacobellis*, supra, that criminal laws are constitutionally limited to hard-core pornography and "I shall not today attempt to further define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it . . .*" (concurring opinion, 378 U.S. at 197. Italics added).

Mr. Justice Black, dissenting in *Ginzburg v. United States*, 383 U.S. 463 (86 S.Ct. 942) referred to *"the confusing welter of opinions* and thousands of words written in this and two other cases today" (383 U.S. at 476. Italics added).

In the three obscenity cases decided on the same day,

i.e., *Ginzburg, Mishkin* and *A Book*, supra, there were *fourteen* separate opinions by Justices of this Court. In the three cases decided in the *Redrup* opinion, no apparent effort was made to reconcile the opinions of the Justices. Rather, the opinion of the Court seemed to lump all of the divergent views of the Justices into one group and reversed three Courts below by applying all of the varying criteria of the various Justices. In passing, we again insist that the *Redrup* cases are easily distinguishable from this case. They all involved magazines being held for sale to the general public at newsstands. The instant case involves possession of three "stag" films not offered to the general public (so far as the available evidence indicates) but intended for private lustful showings to selected audiences.

Our purpose in detailing the divergent views of the Justices is to point out how difficult it is for a State to keep pace with opinions in this field from this Honorable Court. Legislative criminal law revision is a slow and cumbersome process. The Georgia obscenity statute is in accord with *Roth*. However, it has not been amended to meet the refinements tacked on to *Roth* by more recent decisions of this Court in the obscenity field. Indeed, it would be difficult to draft a new statute and be absolutely certain that it meets the varying criteria of all Justices of this Court. We insist, however, that the Georgia statute does not violate the First and Fourteenth Amendments.

Returning to the instant case, we respectfully suggest that there is no necessity for this Court to again elaborate its divergent views on this most confused constitutional problem. If this Court views these films and finds them to be not only obscene by the *Roth* definition, but vile

and filthy to such an extent as to constitute hard-core pornography, then their possession is not protected by the First Amendment, and this Court need not reach the constitutional question. As Mr. Justice Stewart said, "I know it (hard-core pornography) when I see it." In our opinion, if these films are not obscene, then nothing is obscene! We hope this Court will agree with this appraisal.

We recognize, of course, that two Justices have consistently adhered to their view that the First and Fourteenth Amendments absolutely protect obscene and non-obscene material alike (see comment of Mr. Justice Harlan, dissenting opinion, *A Book*, supra, 383 U.S. at 455). However, the rest of the Court have apparently agreed, with some difference in approach, that obscenity is not protected by the First Amendment. If the Court agrees with our appraisal of the films (as well as that of the jury, the trial court and the Supreme Court of Georgia), we urge this Court to either affirm the judgment below, or dismiss the appeal on the grounds that probable jurisdiction was improvidently noted. Alternatively, if the Court reaches the constitutional issue, we urge the Court to hold that a State may make the possession of obscene matter, with knowledge of its obscene nature, a crime without infringing upon First Amendment rights.

(G) These Films Fall in the Same Category as Those in Landau v. Fording, Chief of Police, 54 Cal. Rptr. 177 (1966).

The appellant Landau was exhibiting a movie film in private showings at colleges, art movie houses and a Y.M.C.A. After being advised by police that the next time it was exhibited it would be confiscated, he insti-

tuted an action for declaratory relief in the Superior Court of Alameda County, California. After viewing the film twice and hearing from expert witnesses, the trial Court found the film to be obscene, applying the *Roth* and *Jacobellis* tests and the California Court of Appeal affirmed. This Honorable Court granted certiorari and *affirmed* the lower Court in a 5 to 4 decision on September 12, 1967. *Landau v. Fording*, 388 U.S. 456 (87 S.Ct. 2109).

Counsel for Appellee have never viewed the film in *Landau*, supra, but from the description of the film, as recited by the California Court of Appeal, it was very similar to these films in the instant case. It "explicitly and vividly revealed acts of masterbation, oral copulation, the infamous crime against nature (sodomy), voyeurism, nudity, sadism, masochism and sex" (54 Cal. Rptr. at 178). Like the film in the instant case, it was an 8 mm. silent film of about thirty minutes duration, with no text, dialogue, or dominant theme. The only material difference between the film in *Landau*, relying upon the description by the California Courts, and the three films involved in the instant appeal is that there were no women and no acts of sexual intercourse between male and female in the *Landau* film. The films in the instant case do show acts of sexual intercourse and sodomy between persons of opposite sexes, but do not show, as we recall the films, acts of sadism. In fact, it appears to counsel for Appellee that the three films processed by Appellant Stanley are probably more vile and filthy than that in *Landau*, supra.

A far stronger case is made out in this case than in *Landau*, supra, of the obscene nature of the respective films. For example, in *Landau* the writer, director and

producer was a "French writer of renown" and the actors were professionals (54 Cal. Rptr. at 180, 182). Seven expert witnesses including college professors, novelists, film critics and television directors testified as to the *non-obscene* nature of the film in *Landau*. Contrast this with the instant case. The "producer", actors and actresses of the *Stanley* films are unknown, and not a living soul took the stand in defense of the films in the instant case, where *all* witnesses agreed that the films were obscene.

We submit that by granting certiorari in *Landau* and affirming the California Courts' finding of obscenity, the majority of this Court must have found that film to be obscene and not entitled to the protection of the First Amendment. We respectfully insist that the same finding should be made in the instant case, and the conviction of Appellant Stanley should be affirmed.

II. THE FEDERAL SEARCH WARRANT WAS VALID WHEN ISSUED AND IS NOT RENDERED INVALID RETROACTIVELY BY MARCHETTI V. UNITED STATES, 390 U.S. 39 (88 S.Ct. 697) AND GROSSO V. UNITED STATES, 390 U.S. 62 (88 S.Ct. 709). THE OBSCENE FILMS WERE LAWFULLY SEIZED AS CONTRABAND DURING A LAWFUL SEARCH FOR BOOKMAKING PARAPHERNALIA.

Counsel for Appellee have some uncertainty as to whether this question of alleged unlawful search and seizure is actually before this Court, inasmuch as it is not an appealable question. Appellee conceded this in his Jurisdictional Statement, at page 14, as follows:

> "The search and seizure question, *while not an appealable question,* is substantial and should be treated as a certiorariable question under 28 U.S.C. No. 2103 (Italics added)."

This Court noted probable jurisdiction on October 14, 1968, without elaboration and without restricting review to the only appealable question, the constitutionality of the Georgia obscenity statute. Exactly the same thing occurred in another obscenity case, *Mishkin v. New York*, supra. The Court's opinion held that its "unrestricted notation of probable jurisdiction justified appellant's briefing of the search and seizure issue." (383 U.S. at 512) However, the Court then declined to reach the merits of the search and seizure claim and dismissed the writ as improvidently granted (383 U.S. at 513-514).

On the basis of *Mishkin*, we think that Appellant was justified in briefing this non-appealable issue, and that we must respond to that portion of his brief. It may be that the Court will decide to follow the same course in the instant case as it did in the *Mishkin* case, however.

As previously pointed out, Appellant's Questions 2, 3 and 4 all deal with the search and seizure issue and are overlapping to some extent. We have reframed Question 2 to more clearly establish the exact question before this Court. In this Section we will deal with all of Appellant's issues embodied in Questions 2, 3, and 4.

(A) There is No Issue as to the Validity of the Search Warrant When Issued, and the Sufficiency of the Probable Cause Contained in the Officer's Affidavits.

It is important to note that Appellant has never objected to the search warrant *as issued* on the usual grounds that the property to be searched for and seized is inadequately described or not subject to seizure, the premises are inadequately described, or that there was

insufficient probable cause in the affidavits of the State and Federal officers to authorize the United States Commissioner to issue the search warrant.

The Trial Court made a specific finding that "the lawfulness and sufficiency of said search warrant and affidavits upon which the search warrant was issued were not attacked or questioned by the defense" (A. 58-59). The record completely supports this finding of fact.

Further, nowhere in his Brief on the Merits does Appellant even now raise any question as to the validity of the search warrant or affidavits *as of the date it was issued,* on September 7, 1966. Thus we start off with a valid Federal search warrant to search Appellant's home for bookmaking records, wagering paraphernalia, and money, issued some 16 months prior to the *Marchetti* and *Grosso* decisions relied upon by Appellant.

(B) Appellant Concedes that Normally an Officer Executing a Valid Search Warrant May Seize Contraband or Evidence of Another Crime, Even though the Article is Not Particularly Described in the Warrant.

Counsel for Appellant, with commendable candor, makes the foregoing concession on Page 21 of his Brief on the Merits. Of course, this principle is firmly established in search and seizure case law. In view of this concession, we will not encumber this Brief by citations in support thereof. However, he argues that this general rule does not apply where the undescribed contraband is obscene matter (Brief, pages 19-23). In other words, if the officers had found narcotics, non-tax-paid whiskey or stolen property in Appellant's house while executing the search warrant for bookmaking records, Appellant concedes that they could have lawfully seized such ar-

titles. But he argues that a different standard applies to these films showing sodomy, nudity and sexual intercourse, relying upon *Marcus v. Search Warrants*, 367 U.S. 717 (81 S.Ct. 1708). This reliance is misplaced.

(C) The Instant Case is Completely Distinguishable from *Marcus v. Search Warrants, supra.*

The Supreme Court of Georgia considered and distinguished the *Marcus* case, supra, in the first division of its opinion (A. 66-68). We will elaborate on the vast differences between that case and the instant one. In *Marcus*, Missouri search warrants were issued to seize "obscene publications" (367 U.S. at 732) at five newsstands and one wholesale magazine distributor's establishment. The officers executed the search warrants by seizing all copies of all magazines *which in their judgment* were obscene. Approximately 11,000 copies of 280 publications (consisting of "girlie" magazines, nudist magazines, sex manuals, cartoon and joke books and photography magazines) were hauled away in trucks. Later, the Trial Court found only one hundred of the two hundred eighty seized items to be obscene. This Court found this search and seizure to be unlawful on the following grounds: (1) the warrants specified no publications, but gave the broadest discretion to the officers to select such magazines as they considered obscene; (2) the officers were provided no guide to the exercise of informed discretion; (3) the warrants were issued on the conclusory assertions of a single police officer; (4) decisions were made *ad hoc* on the spot by officers as to obscenity with little opportunity for reflection and deliberation; (5) one hundred eighty publica-

tions not found obscene were suppressed from the market for over two months.

It is really belaboring the obvious to point out the many distinguishing features between *Marcus*, supra, and the instant case. In *Marcus*, a "general" search warrant not particularly describing any obscene publications was executed by a mass seizure by the truckload of both obscene and non-obscene matter from newsstands selling to the public. The officers seized such magazines as they deemed obscene and did not seize others. Seizure or non-seizure depended on the hurried, individual appraisal by each officer of the magazines he examined. Thus, due process safeguards were lacking in *Marcus*, to "assure non-obscene material the constitutional protection to which it is entitled" (367 U.S. at 731). Finally, *Marcus* involved *literature* offered for sale and booksellers, thus squarely involving freedom of speech and of the press, constitutionally guaranteed by the First Amendment.

The instant case is entirely different. Appellant was suspected of being a *bookmaker*, instead of being a *bookseller*. The hidden cans of film were not being offered for sale; they were not part of a stock of merchandise on display in a business establishment, but were concealed in a bedroom. There was no mass seizure at all — only three small rolls of film were seized. Nothing later found to be non-obscene was seized. And the films are so obviously hard-core pornography that any officer or citizen of average intelligence would know it when he saw it. In this case there is no interference with freedom of the press. The general public was not deprived of its rights to purchase these films. At most, the

only persons deprived of the questionable privilege of viewing these films were Appellant's disappointed guests.

Appellant says that the seizure of the films was unlawful without a prior adjudication of obscenity (Brief, Page 22). He says the officer should have gone to a magistrate "to make oath to him what he had seen" and secured an adjudication that the films were obscene. Presumably he means that an officer should have withdrawn from the house and made out an affidavit describing the films he had viewed and obtained a *new* search warrant authorizing seizure of the films. However, Appellant cites no case in support of this line of argument. We will cite one directly in point. In *Johnson v. United States,* D.C. Cir. 1961, 293 F.2d 539, cert. den. 375 U.S. 88, this exact contention was advanced that an officer, who while engaged in searching Appellant's bedroom under a search warrant describing stolen property, found in a dresser drawer a credit card and a statement *not described* in the warrant, should have secured a new search warrant before seizing the credit card and statement. The United States Court of Appeals for the District of Columbia rejected this contention and said, in pertinent part:

> *"An officer engaged in a lawful search is not confined to seizing only those items described in the warrant, especially where the unlisted items seized are instrumentalities of a crime.* The Fourth Amendment provides that the warrant must particularly describe the things to be seized. But it is well established *that given a lawful search some things may be seized in connection therewith which are not described in the warrant.'* Palmer v. United States, 1953, 92 U.S. App. D.C. 103, 104, 203 F.2d

66, 67. See also Bryant v. United States, 5 Cir., 1958, 252 F.2d 746." (Italics added).

The law does not require an officer to do a useless thing. What weight could a new search warrant issued by a magistrate upon a mere description of the films by the officer who had actually viewed them add to the lawfulness of the seizure? It would amount to a judicial determination by the magistrate that the films were obscene, *when he had never viewed them.* Had this been done, Appellant would undoubtedly attack such a procedure as vigorously as he is now attacking the seizure by the officer as it was actually done in this case.

Once again we respectfully insist that the clear-cut pornography of the films is controlling here. No prior adjudication of obscenity was necessary. The films were the kind of obscenity that one recognizes when he sees it. It was contraband under Georgia law, and the State officer would have been derelict in his duty if he had not seized it and arrested the Appellant.

Finally, we point out that the action of the officers in putting the films in a projector and viewing them was entirely reasonable as a logical step in their search for bookmaking records. In this age of sophisticated methods of record keeping, it is entirely possible that a big-time bookmaker might reduce his permanent records, such as names and betting code numbers of his regular customers, and names, addresses and phone numbers of out of state bookie syndicates with him he "lays off" bets, to motion picture films, put them in a can with the misleading title "Young Blood" pasted thereon, and hide it in his desk drawer, hoping it would pass uninspected in the event of a search of his home, in a sort

of "purloined letter" scheme. Cf. *Abel v. United States,* 362 U.S. 217, (80 S.Ct. 683) where a Russian spy had reduced classified security information of this country to 18 microfilms and concealed them in a hollow pencil. Thus, counsel for Appellee respectfully insist that the seizure of the film was entirely lawful *at the time it was done,* and violated none of Appellant's Fourth Amendment rights.

(D) The Decisions in the Marchetti and Grosso Cases Should Not Render Invalid Retroactively a Valid Search Warrant Issued Sixteen Months Prior to Those Decisions.

On the date the Federal search warrant in this case for bookmaking records, etc., was issued, such search warrants were commonplace. This Court had previously held in *United States v. Kahriger,* 345 U.S. 22 (73 S.Ct. 510) and *Lewis v. United States,* 348 U.S. 419 (75 S.Ct. 415) that the Wagering Tax Act was constitutional. A multitude of Federal search warrants similar to the one in the instant case had been upheld, and convictions obtained as a result of evidence seized thereunder had been affirmed by United States Appellate Courts. This is a fact so generally recognized that citations would be superfluous.

This trial was begun on January 17, 1967, and the jury returned a guilty verdict on January 19, 1967 (A. 60). Just slightly over one year later, on January 29, 1968, this Court rendered its decisions in *Marchetti v. United States,* 390 U.S. 39 (88 S.Ct. 697) and *Grosso v. United States,* 390 U.S. 62 (88 S.Ct. 709), holding in effect that a defendant in a criminal case charged with failing to register, pay the occupational tax (*Marchetti*)

and the excise tax (*Grosso*) could assert at trial his constitutional right against self-incrimination under the Fifth Amendment. That is *all* this Court held. The Court said in part, in *Marchetti:*

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissive; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements." (390 U.S. at 61).

Nowhere do *Marchetti* or *Grosso* hold that valid Federal search warrants issued sixteen months prior to those decisions are *retroactively* rendered unlawful. In fact, these cases do not even hold that Federal search warrants could not issue validly *in the future,* to seize bookmaking paraphernalia. It appears to counsel for Appellee that this Court left standing intact the Federal crime but pulled the teeth of its enforcement power by criminal prosecutions, by extending the Fifth Amendment privilege to those gamblers prosecuted in Federal Courts.

Following its decisions in *Marchetti* and *Grosso,* this Court on March 4, 1968, summarily vacated the judgments in some twenty-one criminal cases pending on certiorari from U.S. Circuit Courts of Appeal and from two State Appellate Courts (U.S. Law Week, Vol. 36, No. 34, pages 3338, 3339). Convictions had been affirmed in all these Federal wagering cases under the now overruled *Kahriger, Lewis* doctrine. The two State Court cases where judgments of conviction were vacated both involved gambling. *Rainwater v. Florida,* 186 So. 2d 278, involved a State conviction for lottery obtained by use of evidence seized under a Federal

Court search warrant for wagering paraphernalia. *Lee v. Kansas City,* 414 S.W. 2d 251, involved a State Court conviction for possession of a Federal wagering stamp with intent to use it.

Since the entire rationale of *Marchetti* and *Grosso* was that requiring a gambler to register *federally* and pay *federal* taxes on his wagers compelled him to incriminate himself for violating *State anti-gambling laws,* it is only logical that the *Rainwater* and *Lee* convictions were vacated, since they were the end result of such enforced self-incrimination.

The instant case stands upon an entirely different footing, however. Appellant Stanley *was not convicted* for violating the *State gambling laws.* He was convicted of an entirely different offense — possession of obscene matter. He has not been prosecuted in Federal Court for violation of the wagering laws. He has no legal standing to complain *in an obscenity case* that he would have been forced to incriminate himself if he had registered and paid Federal taxes as a gambler, because he is not charged here with State gambling offenses.

There is also a definite indication that this Court has not yet fully decided how far it will expand its limited ruling in *Marchetti* and *Grosso,* supra. We base this statement upon the case of *United States v. United States Coins and Currency* in the amount of $8,674.00, 7 Cir. 1967, first reported at 379 F.2d 946. This was a libel to forfeit money seized in a search of the person of one Donald Angelina after his lawful arrest at a race track. Recap sheets were also seized from his person at the time of the arrest and incidental search. He had not registered as a gambler and had not paid the Federal

occupational tax. The Seventh Circuit Court of Appeals initially affirmed the District Court's forfeiture of the money.

After this Court issued its opinions in *Marchetti* and *Grosso*, it granted certiorari in this libel action and vacated the judgment of the Seventh Circuit, citing *Marchetti* and *Grosso* (see 390 U.S. 204). The Seventh Circuit Court of Appeals then reconsidered *United States v. U.S. Coins and Currency*, etc., supra, and by construction of *Marchetti* and *Grosso reversed* the District Court's forfeiture of the money, (393 F.2d 499), on April 8, 1968. The United States sought certiorari from this latest adverse decision of the Seventh Circuit and this Honorable Court *granted* certiorari on November 18 ,1968 (37 U.S. Law Week 3181).

Thus this question as to whether money (the fruits of the crime of violating the Federal Wagering Act) can be forfeited, despite *Marchetti* and *Grosso*, has gone full circle and is back before this Court for decision. We think that case illustrates the narrow scope of the ruling of this Court in *Marchetti* and *Grosso*, and shows that the exact implications and extent of those two decisions are still in flux by this Court. We can certainly see nothing in those decisions which could possible reach back sixteen months and render invalid a Federal search warrant which was completely valid under prior decisions of this Court at the time of its issuance.

In one final word, we respectfully point out that this Court does not as a rule apply retroactively far-reaching decisions which establish new concepts or which overrule this Court's other earlier decisions. It is almost unnecesary to cite (search and seizure) *Mapp v. Ohio*,

367 U.S. 643 (81 S.Ct. 1648), held not retroactive in *Linkletter v. Walker*, 381 U.S. 618 (85 S.Ct. 1731); (comment on failure of accused to testify) *Griffin v. California*, 380 U.S. 609 (85 S.Ct. 1229), held not retroactive in *Tehan v. Shott*, 382 U.S. 406 (86 S.Ct. 459); (confessions) *Miranda v. Arizona*, 384 U.S. 436 (86 S.Ct. 1602) held not retroactive in *Johnson v. New Jersey*, 384 U.S. 719 (86 S.Ct. 1772); and (line-up identification) *United States v. Wade*, 388 U.S. 218 (87 S.Ct. 1926) and *Gilbert v. California*, 388 U.S. 263 (87 S.Ct. 1951) held not retroactive in *Stovall v. Denno*, 388 U.S. 293 (87 S.Ct. 1967).

For all the reasons urged, the *Marchetti* and *Grosso* decisions should have no retroactive effect upon a valid Federal search warrant issued, executed and introduced in evidence in a motion to suppress evidence preceding a criminal trial occurring long before those decisions were rendered by this Honorable Court.

CONCLUSION

The Georgia obscenity statute is constitutional. The films in question are so clearly hard core pornography that their possession is not protected by the First Amendment. They were lawfully seized as contraband under authority of a valid Federal search warrant. Therefore, this Honorable Court should either affirm the judgment of the Supreme Court of Georgia, or dismiss this appeal on the ground that probable jurisdiction was improvidently noted.

Respectfully submitted,

J. ROBERT SPARKS
Assistant District Attorney
Atlanta Judicial Circuit

Fulton County
Courthouse
Atlanta, Georgia 30303

LEWIS R. SLATON
District Attorney
Atlanta Judicial Circuit

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief for Appellee on the Merits with first class postage prepaid, addressed to Wesley R. Asinof, Esquire, 3424 First National Bank Building, Atlanta, Georgia 30303, counsel of record for Appellant.

This 19th day of December, 1968.

J. ROBERT SPARKS
Assistant District Attorney
Atlanta Judicial Circuit

SUPREME COURT OF THE UNITED STATES

No. 293.—October Term, 1968.

Robert Eli Stanley, Appellant, v. State of Georgia.	On Appeal From the Supreme Court of Georgia.

[April 7, 1969.]

Mr. Justice Marshall delivered the opinion of the Court.

An investigation of appellant's alleged bookmaking activities led to the issuance of a search warrant for appellant's home. Under authority of this warrant, federal and state agents secured entrance. They found very little evidence of bookmaking activity, but while looking through a desk drawer in an upstairs bedroom, one of the federal agents, accompanied by a state officer, found three reels of eight-millimeter film. Using a projector and screen found in an upstairs living room, they viewed the films. The state officer concluded that they were obscene and seized them. Since a further examination of the bedroom indicated that appellant occupied it, he was charged with possession of obscene matter and placed under arrest. He was later indicted for "knowingly hav[ing] possession of obscene matter" in violation of Georgia law.[1] Appel-

[1] "Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away or who shall knowingly have possession of, or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell, expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such

lant was tried before a jury and convicted. The Supreme Court of Georgia affirmed. *Stanley* v. *State*, 224 Ga. 259, 161 S. E. 2d 309 (1968). We noted probable jurisdiction of an appeal brought under 28 U. S. C. § 1257 (2). 393 U. S. 819 (1968).

Appellant raises several challenges to the validity of his conviction.[1] We find it necessary to consider only one. Appellant argues here, and argued below, that the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment, as made applicable to the States by the Fourteenth Amendment. For reasons set forth below, we agree that the mere private possession of obscene matter cannot constitutionally be made a crime.

The court below saw no valid constitutional objection to the Georgia statute, even though it extends further than the typical statute forbidding commercial sales of obscene material. It held that "[i]t is not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was 'with intent to sell, expose or circulate the same.'" *Stanley* v. *State*, *supra*, 224 Ga., at 261, 161 S. E. 2d, at 311. The State and appellant both agree that the question here before us is whether "a statute imposing criminal sanctions upon the mere [knowing] possession of obscene

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matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years; Provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion." Ga. Code Ann. § 26-6301 (Supp. 1968).

[1] Appellant does not argue that the films are not obscene. For the purpose of this opinion, we assume that they are obscene under any of the tests advanced by members of this Court. See *Redrup* v. *New York*, 386 U. S. 767 (1967).

matter" is constitutional. In this context, Georgia concedes that the present case appears to be one of "first impression . . . on this exact point,"[2] but contends that since "obscenity is not within the area of constitutionally protected speech or press," *Roth* v. *United States*, 354 U. S. 476, 485 (1957), the States are free, subject to the limits of other provisions of the Constitution, see, *e. g.*, *Ginsberg* v. *New York*, 390 U. S. 629, 637–645 (1968), to deal with it any way deemed necessary, just as they may deal with possession of other things thought to be detrimental to the welfare of their citizens. If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind?

It is true that *Roth* does declare, seemingly without qualification, that obscenity is not protected by the First Amendment. That statement has been repeated in various forms in subsequent cases. See, *e. g.*, *Smith* v. *California*, 361 U. S. 147, 152 (1959); *Jacobellis* v. *Ohio*, 378 U. S. 184, 186–187 (1964) (opinion of BRENNAN, J.); *Ginsberg* v. *New York*, *supra*, 390 U. S., at 635. However, neither *Roth* nor any subsequent decision of this Court dealt with the precise problem involved in the present case. Roth was convicted of mailing obscene circulars and advertising, and an obscene book, in violation of a federal obscenity statute.[4] The defendant in a companion case, *Alberts* v. *California*, 354 U. S. 476 (1957), was convicted of "lewdly keeping for sale obscene and indecent books, and [of] writing, composing and publishing

[2] The issue was before the Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), but that case was decided on other grounds. MR. JUSTICE STEWART, although disagreeing with the majority opinion in *Mapp*, would have reversed the judgment in that case on the ground that the Ohio statute proscribing mere possession of obscene material was "not consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment." 367 U. S., at 672.

[4] 18 U. S. C. § 1461.

an obscene advertisement of them . . . ." 354 U. S., at 481. None of the statements cited by the Court in *Roth* for the proposition that "this Court has always assumed that obscenity is not protected by the freedoms of speech and press" were made in the context of a statute punishing mere private possession of obscene material; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination.[3] Moreover, none of this Court's decisions subsequent to *Roth* involved prosecution for private possession of obscene materials. Those cases dealt with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter.[4] Indeed, with one

[3] *Ex parte Jackson*, 96 U. S. 727, 736–737 (1878) (use of the mails); *United States* v. *Chase*, 135 U. S. 255, 261 (1890) (use of the mails); *Robertson* v. *Baldwin*, 165 U. S. 275, 281 (1897) (publication); *Public Clearing House* v. *Coyne*, 194 U. S. 497, 508 (1904) (use of the mails); *Hoke* v. *United States*, 227 U. S. 308, 322 (1913) (use of interstate facilities); *Near* v. *Minnesota*, 283 U. S. 697, 716 (1931) (publication); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942) (utterances); *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 158 (1946) (use of the mails); *Winters* v. *New York*, 333 U. S. 507, 510 (1948) (possession with intent to sell); *Beauharnais* v. *Illinois*, 343 U. S. 250, 266 (1952) (libel).

[4] Many of the cases involved prosecutions for sale or distribution of obscene materials or possession with intent to sell or distribute. See *Redrup* v. *New York*, 386 U. S. 767 (1967); *Mishkin* v. *New York*, 383 U. S. 502 (1966); *Ginsburg* v. *United States*, 383 U. S. 463 (1966); *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964); *Smith* v. *California*, 361 U. S. 147 (1961). Our most recent decision involved a prosecution for sale of obscene material to children. *Ginsberg* v. *New York*, 390 U. S. 629 (1968); cf. *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U. S. 676 (1968). Other cases involved federal or state statutory procedures for preventing the distribution or mailing of obscene material, or procedures for predistribution approval. See *Freedman* v. *Maryland*, 380 U. S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Manual*

exception, we have been unable to discover any case in which the issue in the present case has been fully considered.[7]

Enterprises, Inc. v. *Day*, 370 U. S. 478 (1962); *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (1957). Still another case dealt with an attempt to seize obscene material "kept for the purpose of being sold, published, exhibited . . . or otherwise distributed or circulated . . . ." *Marcus* v. *Search Warrant*, 367 U. S. 717, 719 (1961); see also *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964). *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), was a proceeding in equity against a book. However, possession of a book determined to be obscene in such a proceeding was made criminal only when "for the purpose of sale, loan or distribution." 383 U. S., at 422.

[7] The Supreme Court of Ohio considered the issue in *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387 (1960). Four of the seven judges of that court felt that criminal prosecution for mere private possession of obscene materials was prohibited by the constitution. However, Ohio law required the concurrence of "all but one of the judges" to declare a state law unconstitutional. The view of the "dissenting" judges was expressed by Judge Herbert:

"I cannot agree that mere private possession of . . . [obscene] literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his rights as an individual." 170 Ohio St., at 437, 166 N. E. 2d, at 393.

Shortly thereafter, the Supreme Court of Ohio interpreted the Ohio statute to require proof of "possession and control for the purpose of circulation or exhibition." *State* v. *Jacobellis*, 173 Ohio St. 22, 27-28, 179 N. E. 2d 777, 781 (1962), rev'd on other grounds, 378 U. S. 184 (1964). The interpretation was designed to avoid the constitutional problem posed by the "dissenters" in *Mapp*. See *State* v. *Ross*, 12 Ohio St. 2d 37, 231 N. E. 2d 299 (1967).

Other cases dealing with nonpublic distribution of obscenity or with legitimate uses of obscenity have expressed similar reluctance to make such activity criminal, albeit largely on statutory grounds. In *United States* v. *Chase*, 135 U. S. 255 (1890), the Court held that federal law did not make criminal the mailing of a private sealed obscene letter on the ground that the law's purpose was to purge the mails of obscene matter "as far as was consistent with

"In this context, we do not believe that this case can be decided simply by citing *Roth*. *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of this Court reaches that far. As the Court said in *Roth* itself, '[c]easeless vigilance is the watchword to prevent . . . erosion [of First Amendment rights] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' 354 U. S., at 488. *Roth* and the cases following it discerned such an "important

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the rights reserved to the people, and with a due regard to the security of private correspondence . . . ." 135 U. S., at 261. The law was later amended to include letters and was sustained in that form. *Andrews* v. *United States*, 162 U. S. 420 (1896). In *United States* v. *31 Photographs*, 156 F. Supp. 360 (D. C. S. D. N. Y. 1957), the court denied an attempt by the Government to confiscate certain materials sought to be imported into the United States by the Institute for Sex Research, Inc., at Indiana University. The court found, applying the *Roth* formulation, that the materials would not appeal to the "prurient interest" of those seeking to import and utilize the materials. Thus, the statute permitting seizure of "obscene" materials was not applicable. The court found it unnecessary to reach the constitutional questions presented by the claimant, but did note its belief that "the statement . . . [in *Roth*] concerning the rejection of obscenity must be interpreted in the light of the widespread distribution of the material in *Roth*." 156 F. Supp., at 360, n. 40. See also *Redmond* v. *United States*, 384 U. S. 264 (1966), where this Court granted the Solicitor General's motion to vacate and remand with instructions to dismiss an information charging a violation of a federal obscenity statute in a case where a husband and wife mailed undeveloped films of each other posing in the nude to an out-of-state firm for developing. But see *Ackerman* v. *United States*, 293 F. 2d 449 (C. A. 9th Cir. 1961).

interest" in the regulation of commercial distribution of obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.

It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive . . . ." *Martin* v. *City of Struthers*, 319 U. S. 141, 143 (1943); see *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965); *Lamont* v. *Postmaster General*, 381 U. S. 301, 307–308 (1965) (BRENNAN, J., concurring); cf. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). This right to receive information and ideas, regardless of their social worth, see *Winters* v. *New York*, 333 U. S. 507, 510 (1948), is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

See *Griswold v. Connecticut*, *supra*; cf. *NAACP v. Alabama*, 357 U. S. 449, 462 (1958).

These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts.[8] To

[8] "Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed

some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. As the Court said in *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684, 688–689 (1959), "[t]his argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. . . . And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Cf. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495 (1952). Nor is it relevant that obscenity in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. See *Winters v. New York*, *supra*, 333 U. S., at 510. Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

Perhaps recognizing this, Georgia asserts that exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion.[7] But more importantly, if the State is only concerned about literature

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for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin." Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Col. L. Rev. 391, 395 (1963).

[7] See, *e. g.*, Cairns, Paul & Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence, 46 Minn. L. Rev. 1009 (1962); see also Jahoda, The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate (1954), summarized in the concurring opinion of Judge Frank in *United States* v. *Roth*, 237 F. 2d 796, 814–816 (C. A. 2d Cir. 1956).

inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . ." *Whitney v. California*, 274 U. S. 357, 378 (1927) (Brandeis, J., concurring). See Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 938 (1963). Given the present state of knowledge, the State may no more prohibit mere possession of obscenity on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of antisocial conduct or would probably induce its recipients to such conduct. 354 U. S., at 486–487. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children, see *Ginsberg* v. *New York*, *supra*, or that it might intrude upon the sensibilities or privacy of the general public.[10] See *Redrup* v. *New York*, 386 U. S. 767, 769 (1967). No such dangers are present in this case.

Finally, we are faced with the argument that prohibition of possession of obscenity is a necessary incident to

[10] The Model Penal Code provisions dealing with obscenity are limited to cases of commercial dissemination. Model Penal Code § 251.4 (Prop. Official Draft 1962); see also Model Penal Code § 207.10 and comment 4 (Tent. Draft No. 6, 1957); H. Packer, The Limits of the Criminal Sanction 316–328 (1968); Schwartz, Morals Offenses and the Model Penal Code, 63 Col. L. Rev. 669 (1963).

statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws. See *Smith* v. *California, supra.*

We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.[11] *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home. Accordingly, the judgment of the court below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

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[11] What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.

Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials. See, *e. g.*, 18 U. S. C. § 793 (d), which makes criminal the otherwise lawful possession of materials which "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation . . . ." In such cases, compelling reasons may exist for overriding the right of the individual to possess those materials.

SUPREME COURT OF THE UNITED STATES

No. 293.—October Term, 1968.

Robert Eli Stanley, Appellant, v. State of Georgia.	On Appeal From the Supreme Court of Georgia.

[April 7, 1969.]

Mr. Justice Black, concurring.

I agree with the Court that the mere possession of reading matter or movie films, whether labeled obscene or not, cannot be made a crime by a State without violating the First Amendment, made applicable to the States by the Fourteenth. My reasons for this belief have been set out in many of my prior opinions, as for example, *Smith* v. *California*, 361 U. S. 147, 155 (concurring opinion), and *Ginzburg* v. *New York*, 383 U. S. 463, 476 (dissenting opinion).

SUPREME COURT OF THE UNITED STATES

No. 203.—October Term, 1906.

Stanley, Appellant, | On Appeal From the
v. | Supreme Court of
State of Georgia. | Georgia.

[April 2, 1906.]

Mr. Justice Holmes, concurring.

I agree with the Court that the mere possession of reading matter—even blue, whether labeled libelous or not, cannot be made a crime by a state without violating the Fourteenth Amendment, made applicable to the states by the Fourteenth. My objection to the Public Statutes by the Supreme Court of the State of Georgia, and Kentucky, and [illegible] 203 U. S. [illegible] 203 U. S. [illegible] 203 U. S.

SUPREME COURT OF THE UNITED STATES

No. 293.—October Term, 1968.

Robert Eli Stanley, Appellant, v. State of Georgia. | On Appeal From the Supreme Court of Georgia.

[April 7, 1969.]

Mr. Justice Stewart, with whom Mr. Justice Brennan and Mr. Justice White join, concurring in the result.

Before the commencement of the trial in this case, the appellant filed a motion to suppress the films as evidence upon the ground that they had been seized in violation of the Fourth and Fourteenth Amendments. The motion was denied, and the films were admitted in evidence at the trial. In affirming the appellant's conviction, the Georgia Supreme Court specifically determined that the films had been lawfully seized. The appellant correctly contends that this determination was clearly wrong under established principles of constitutional law. But the Court today disregards this preliminary issue in its hurry to move on to newer constitional frontiers. I cannot so readily overlook the serious inroads upon Fourth Amendment guarantees contenanced in this case by the Georgia courts.

The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The purpose of these clear and precise words was to guarantee to the people of this Nation that they should forever be secure from the general searches and unrestrained seizures that had been a hated hallmark of colonial rule under the notorious writs of assistance of the British

Crown. See *Stanford* v. *Texas*, 379 U. S. 476, 481. This most basic of Fourth Amendment guarantees was frustrated in the present case, I think, in a manner made the more pernicious by its very subtlety. For what happened here was that a search that began as perfectly lawful became the occasion for an unwarranted and unconstitutional seizure of the films.

The state and federal officers gained admission to the appellant's house under the authority of a search warrant issued by a United States Commissioner. The warrant described "the place to be searched" with particularity.[1] With like particularity, it described "the things to be seized"—equipment, records, and other material used in or derived from an illegal wagering business.[2] And the warrant was issued only after the Commissioner had been apprised of more than adequate probable cause to issue it.[3]

There can be no doubt, therefore, that the agents were lawfully present in the appellant's house, lawfully authorized to search for any and all of the items specified in

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[1] "[T]he premises known as 280 Springside Drive, S. E., two story residence with an annex on the main floor constructed of brick and frame, in Atlanta, Fulton County, Georgia, in the Northern District of Georgia . . . ."

[2] "[B]ookmaking records, wagering paraphernalia consisting of bet slips, account sheets, recap sheets, collection sheets, adding machines, money used in or derived from the wagering business, records of purchases, records of real estate and bank transactions, the money for which was derived from the wagering business, and any other property used in the wagering business, which are being used and/or have been used in the operation of a bookmaking business or represent the fruits of a bookmaking business being operated in violation of Sections 4411, 4412 and 7203 IRC of 1954."

[3] Before the Commissioner were no less than four lengthy and detailed affidavits, setting out the grounds for the affiants' reasonable belief that the appellant was engaged in an illegal gambling enterprise, and that the paraphernalia of his trade were concealed in his house.

the warrant, and lawfully empowered to seize any such items they might find.[4] It follows, therefore, that the agents were acting within the authority of the warrant when they proceeded to the appellant's upstairs bedroom and pulled open the drawers of his desk. But when they found in one of those drawers not gambling material but moving picture films, the warrant gave them no authority to seize the films.

The controlling constitutional principle was stated in two sentences by this Court more than 40 years ago:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States*, 275 U. S. 192, 196.

This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence[5] in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection. And this is not a case that presents any questions as to the permissible scope of a search made incident to a lawful arrest. For the appellant had not been arrested when the agents found the films. After finding them, the agents spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant.

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[4] The fact that almost no gambling material was actually found has no bearing, of course, upon the validity of the search. The constitutionality of a search depends in no measure upon what it brings to light. *Byars* v. *United States*, 273 U. S. 28, 29.

[5] See *Warden* v. *Hayden*, 387 U. S. 294.

Even in the much criticized case of *United States* v. *Rabinowitz*, 339 U. S. 56, the Court emphasized that "exploratory searches . . . cannot be undertaken by officers, with or without a warrant." *Id.*, at 62. This record presents a bald violation of that basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.

Because the films were seized in violation of the Fourth and Fourteenth Amendments, they were inadmissible in evidence at the appellant's trial. *Mapp* v. *Ohio*, 367 U. S. 643. Accordingly, the judgment of conviction must be reversed.